PP v. SITI AISYAH & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, SHAH ALAM
AZMI ARIFFIN J
[CRIMINAL TRIALS NO: BA-45B-37-06-2017 & 45B-38-06-2017]
2 APRIL 2019

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Common intention – Accused persons rubbed poison on deceased's eyes – Deceased died due to acute poisoning – Whether death caused by act of accused persons – Intention – Whether accused persons intended to cause death – Whether intended to cause bodily injuries as were sufficient in ordinary course of nature to cause death – Whether act committed in furtherance of common intention – Whether prima facie case established*

CRIMINAL LAW: *Penal Code – Section 34 – Common intention – Murder – Accused persons rubbed poison on deceased's eyes – Deceased died due to acute poisoning – Whether there was common intention between accused persons to commit murder – Respective conduct of accused persons – Whether of any consequence – Whether prima facie case established*

CRIMINAL PROCEDURE: *Discharge – Discharge not amounting to acquittal – Accused persons charged for murder with common intention – Prima facie case established – Prosecution withdrew charge against first accused before defence entered and applied for discharge not amounting to acquittal – Whether valid reasons shown for application and withdrawal – Whether court ought to order discharge not amounting to acquittal – Criminal Procedure Code, ss. 254(1) & 376 – Penal Code, ss. 34 & 302*

CRIMINAL PROCEDURE: *Charge – Alternative charge – Accused persons charged for murder with common intention – Penal Code, ss. 34 & 302 – Prima facie case established – Prosecution tendered alternative charge to second accused before defence entered – Offence of voluntarily causing hurt by means of poison under s. 324 of Penal Code – Second accused pleaded guilty to alternative charge – Sentencing – Factors to be considered*

CRIMINAL PROCEDURE: *Public Prosecutor – Powers and functions – Discretionary powers to institute, conduct or discontinue any criminal proceedings – Federal Constitution, art. 145 – Criminal Procedure Code, s. 376*

EVIDENCE: *Admissibility – CCTV footages – Accused persons charged for murder with common intention – Accused persons rubbed poison on deceased's eyes – Deceased died due to acute poisoning – Accused persons' acts captured on CCTV – Prosecution relied heavily on CCTV footages to prove death caused by act of accused persons – Whether CCTV footages admissible – Whether satisfied requirement of s. 90A of Evidence Act 1950*

The accused persons were charged, in furtherance of common intention with four North Koreans still at large, for the murder of one Kim Jong-nam ('the deceased'), a Korean national, under s. 302 read with s. 34 of the Penal Code ('PC'). The four North Koreans were identified as Ri Ji Hyon ('Mr Y'), Ri Jae Nam, Hong Song Hac ('Mr Chang') and O Jong Gil. The evidence led by the prosecution revealed that (i) a staff ('SP2') at the information counter of the Kuala Lumpur International Airport 2 ('KLIA2') testified that the deceased was trembling when he approached her, requesting to be taken to the police station; (ii) the deceased described with his hands, to SP2, how two women attacked him from behind and rubbed something on his eyes; (iii) the deceased was then taken to a police officer ('SP1') to lodge a police report at KLIA2; (iv) SP1 observed that there was fluid on the deceased's face and his eyes were slightly red; (v) the deceased was taken to a clinic at KLIA2 and while walking out of the lift, the deceased told SP1 to walk slowly as his vision was blur and he could not see; (vi) at the clinic, the doctor who attended to the deceased testified that the deceased (a) seemed in pain as he was sweating profusely while clutching his head, with his eyes shut tight; (b) had a normal sugar reading but his blood pressure, which was 220/109, was very high and dangerous if not treated immediately; (c) had a fast heart rate of 120 beats per minute; (d) had a seizure, and his eyes rolled upwards while his mouth drooled with saliva, before he became unconscious and unresponsive; (e) was stabilised and taken to the hospital where he eventually passed away; (vii) the post-mortem report ('exh. P20') (a) detected VX, a nerve agent, and its degradation products and precursors, on the deceased, particularly on the swabs of his eye mucosa and face, in the plasma, in his blood and urine and on his t-shirt, blazer and bag; (b) suggested an acute exposure to a toxic substance; and (c) the deceased's death was caused by acute VX (nerve agent) poisoning; and (viii) a chemist testified that (a) VX is the deadliest nerve agent ever created as it ranks highest in terms of toxicity for a nerve agent; (b) a drop of VX is sufficient to cause fatal disruption to the nerve system and the VX found on the deceased was in a pure form; (c) the best method of assassinating someone would probably be by applying VX on the eyes and the skin of the neck; (d) to decontaminate, a person must wash and scrub his/her hands with water and soap within 15 minutes upon contact; (e) degradation of VX was found on the first accused's shirt; and (f) VX was found on the second accused's t-shirt while VX's precursor was found on her t-shirt and fingernails and VX's degradation on the sleeve of her t-shirt.

Apart from the above evidence, the prosecution also led evidence of several camera footages retrieved from closed-circuit television ('CCTV'), showing the series of events before and after the deceased's death, namely, (i) the second accused person's presence at KLIA2 since 6.59am prior to the attack; (ii) the second accused person walking with Mr Y at level 3 Green Zone; (iii) the second accused person having a conversation with Mr Chang at a restaurant; (iv) the deceased entering the Green Zone and walking towards

the self-check-in kiosk at level 3; (v) the image of a woman in a white t-shirt approaching the deceased and appearing to put her hands over his face from behind; (vi) the image of a woman in white t-shirt, and another woman, hurriedly leaving the scene in different directions immediately after the incident; (vii) the deceased heading to the information counter and communicating with SP2 and describing something to her, using his hands; (viii) images of SP1 and SP2; (ix) the second accused person entering and leaving the toilet near the clinic before lingering outside the toilet area; and (x) the accused persons waiting for their taxis at different times. During cross-examination, the accused persons submitted that they were scapegoats as they thought they were taking part in a reality prank show when they were approached at KLIA2. The second accused admitted to carrying out a prank but submitted that she did not know the liquid was a toxic nerve agent. The first accused, on the other hand, submitted that her presence at KLIA2 was just to do a video prank but denied applying anything on the deceased's face.

Satisfied that a *prima facie* case had been established at the conclusion of the prosecution's case, the accused persons were called to enter their defences. However, before the accused persons could enter their respective defences, the Deputy Public Prosecutor ('DPP') withdrew the charge against the first accused person and persuaded the court to order a discharge not amounting to an acquittal ('DNAA'), pursuant to s. 254(1) of the Criminal Procedure Code ('CPC'), without furnishing any reasons. The first accused person, on the other hand, urged the court to acquit and discharge ('DAA') her under s. 254(3) of the CPC. The DPP then tendered an alternative charge against the second accused person under s. 324 of the Penal Code, for the offence of voluntarily causing hurt by means of a VX poison. The second accused person pleaded guilty to the alternative charge and, in her mitigation against the sentence, submitted that (i) she had pleaded guilty immediately after the alternative charge was offered and read to her; (ii) she was a first-time offender with no records of previous conviction; (iii) she was 30 years old, still single and was the youngest child of five; and (iv) she was remorseful and regretful over what she had done. The DPP, on the other hand, submitted paramount consideration ought to be given to public interest and the offence committed was a serious act, deserving a deterrent sentence.

Held (ordering discharge of first accused person not amounting to acquittal; sentencing second accused person to three years and four months' imprisonment):

(1) In order to establish a *prima facie* case of murder as per the charge, it was incumbent upon the prosecution to prove (i) the death of the deceased ('first ingredient'); (ii) the death was caused by the act of the accused persons ('second ingredient'); (iii) the accused persons intended by such act to cause death, or such bodily injuries as they knew to be likely to cause death or sufficient in the ordinary course of nature to cause death

A ('third ingredient'); and (iv) the act of causing death was committed in furtherance of a common intention with four others still at large ('fourth ingredient'). (para 11)

(2) The first ingredient did not appear to have been strongly disputed and had been satisfied. To establish the second ingredient, the prosecution B relied too heavily on the CCTV footages though certain images may not seem clear. The CCTV footages tendered in court had satisfied the requirements of s. 90A of the Evidence Act 1950 and were therefore admissible as evidence (except the footage showing the first accused person seated in a restaurant at KLIA2 in handcuffs while being escorted C by a few policewomen). The court was satisfied with the authenticity and originality of the footages. (paras 13, 16 & 17)

(3) Based on the CCTV footages, it was clear that the accused persons were present at the KLIA2 Departure Hall on that fateful day along with the four North Koreans, that the first accused person appeared calm and D relaxed prior to the attack but was seen hurriedly took an escalator heading towards level 2 with her hands up immediately after the attack, that the second accused person, immediately after the attack, was seen walking, also with both hands up, before quickly entering the toilet near the clinic, that after the second accused person came out from the toilet, E both her hands were down and she was also seen walking and using her handphone at a relaxed pace. Their pattern of conduct seemed identical and not a mere coincidence. It could be inferred that their movements were deliberate. They walked towards the deceased to wipe him out with all the calculated speed done with or marked with full F consciousness of the nature and effect of their actions. (paras 18 & 20-22)

(4) The evidence pointing to the simultaneous attack on the deceased's eyes by the accused persons could also be inferred from the surrounding circumstances, their conduct immediately after the attack and other G supporting and forensic evidence. The inevitable conclusion from all these would be to attract criminal culpability pursuant to s. 114 of the Evidence Act 1950. Taking the evidence cumulatively, the accused persons were the perpetrators leading to the death of the deceased. (paras 23 & 25)

H **(5)** Intention to kill could be inferred as the focus of the attacks was only the deceased's eyes. The route of penetration is very fast through the eyes, compared to hands and feet, as evidenced by the deceased's death just one and a half hours later. The acts of the accused persons were not only consistent with them knowing the strategic point to attack but also I the use of VX as a chemical weapon sufficient to cause death. This indicated the degree of deliberation on the part of the accused persons in carrying out their acts. After the attack, the accused persons had to be very quick to wash their hands. The CCTV footage did not show the

first accused person entering the toilet but she was seen lingering outside the toilet. It could be inferred that the first accused person was in the toilet even though her entry and exit were not captured by the CCTVs. On the other hand, the second accused person was seen entering the toilet. Their desperate act of rushing to the toilet was solely for the purpose of decontaminating the poisonous VX on their hands. The third ingredient was hence established. (paras 38 & 39)

(6) Common intention, the fourth ingredient, is a question of fact. The proof of common intention is a matter of inference from the circumstances, derived from the conduct of the accused persons and the four North Koreans still at large. It could be seen, from the CCTV footages, that the four North Koreans were present at KLIA2 on the fateful day. Having considered the conduct of these four North Koreans, it was manifest that they played a substantial role throughout the fatal encounter. They were not mere by-standers; they were part of the chain that led to the murder of the deceased even though they did not lay a finger on him. An inference on common intention could be gathered from when the accused persons were separately seen together with Mr Chang and Mr Y respectively before the attack, the manner the accused persons mounted the attack, the deadly substance used, the concerted conduct subsequent to the commission of the offence, and the conduct of the accused persons in taking their respective taxis to leave KLIA2. Like inference could also be drawn from the fact that, immediately after the attack, the four North Koreans changed their clothes to disguise themselves and left Malaysia three hours after the incident. All these acts, combined, proved their common intention to murder even though they were not physically seen in a group. (paras 51 & 52)

(7) The word 'prank' means 'a practical joke or mischievous act'. The sole purpose of a prank is fun and it has no purpose to cause any type of harm. In the opening of each television prank, the actors will introduce how the prank would be carried out and how it would be shown. At the end of every prank, the hidden cameras are revealed and will definitely make everyone involved laugh or put a smile on the crews' faces and the show ends. There is no way that the actor can play his/her prank alone because crews are needed and these crews will be at a far-point that is hidden and not visible to the person the prank will be played on. None of the above features could be seen or found in the CCTV footages. Further, the contemporaneous conduct of the accused persons, immediately after getting rid of the deceased, appeared very strange. The footages showed two women seeming to be desperate and hurriedly rushing for separate restrooms after the attack and holding their hands away from themselves which certainly whittled away their claim that there was no suspicious conduct on their part. The precise timing and the manner, in which the act was done, supported the reasonable inference that they knew the liquid placed on their palms was toxic. (paras 119-121 & 124)

(8) There was no valid reason why a discharge amounting to an acquittal should be given after the court had considered the oral and documentary evidence tendered by the prosecution, ruled that a *prima facie* case had been established and called the accused persons to enter their defence. Notwithstanding, the first accused person was accorded a discharge not amounting to an acquittal or DNAA. A DNAA is the most appropriate order to be given even though there was a failure on the part of the prosecution to provide reasons for the application. (paras 187 & 188)

(9) Balancing the interest of the public and that of the second accused person, imprisonment for a term of three years and four months was a fair sentence to be meted out against the second accused person. (para 197)

Case(s) referred to:

Abdul Samid Edward v. PP [2015] 4 CLJ 149 CA ***(refd)***
Ahmad Majmi Idris & Anor v. PP [2014] 1 LNS 148 CA ***(refd)***
Ahmad Najib Aris v. PP [2007] 2 CLJ 229 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Barenda Kumar Ghosh v. Emperor AIR 1925 PC 1 ***(refd)***
Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Emperor v. Karimuddin Sheikh AIR 1932 Cal 373 ***(refd)***
Farose Tamure Mohamad Khan v. PP & Other Appeals [2016] 9 CLJ 769 FC ***(refd)***
Ganesan Subramaniam v. PP [2016] 6 CLJ 588 HC ***(refd)***
Ghasem Gharezadehsharbiani Hassan v. PP [2014] 1 LNS 752 CA ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Hashim Mat Isa v. PP [1950] 1 LNS 23 HC ***(refd)***
Jones v. Dunkel [1959] 101 CLR 298 ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Khoo Hi Chiang v. PP & Another Appeal [1994] 2 CLJ 151 SC ***(refd)***
Koh Teck Chai v. PP [1967] 1 LNS 72 HC ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***
Lee Fah Sang v. PP [1967] 1 LNS 80 FC ***(refd)***
Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***
Lim Heng Soon & Anor v. PP [1969] 1 LNS 93 ***(refd)***
Ling Ngan Liong v. PP [1963] 1 LNS 75 FC ***(refd)***
Mesnayo Longdi v. PP [2015] 1 LNS 1156 CA ***(refd)***
Mohamed Yasin Husin v. PP [1976] 1 LNS 75 PC ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Mohd Bakri Belaho v. PP [2008] 2 CLJ 240 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Nasrul Annuar Abd Samad v. PP [2005] 1 CLJ 193 HC ***(refd)***
Pathmanathan Nalliannen & Others v. PP (Criminal Appeal No: 05-277,281-12/2015)(Unreported) ***(refd)***
PP lwn. Muniandy Ramakrishnan & Yang Lain Dan Satu Lagi Rayuan [2018] 1 LNS 508 CA ***(refd)***

PP v. Chang Kok Foo [2015] 1 LNS 481 HC ***(refd)***
PP v. Dato' Mokhtar Hashim [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lau Ngiik Yin [2008] 10 CLJ 410 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113(3), 152, 153, 156, 254(1), (3), 289, 376
Evidence Act 1950, ss. 3, 5, 8(1), 9, 14, 32(1)(a), 90A(2), 114(g)
Federal Constitution, art. 145
Mutual Assistance In Criminal Matters Act 2002, s. 8
Penal Code, ss. 34, 302, 324

Other source(s) referred to:
Phipson on Evidence, 13th edn, p 345
Ratanlal & Dhirajlal's, Law of Crimes, With List of Malaysian Cases, 24th edn vol 2, pp 1296, 1304, 1391

For the prosecution - Muhamad Iskandar Ahmad; Wan Shaharuddin Wan Ladin, Raja Zaizul Faridah Raja Zaharuddin & Fairuz Johari; DPPs
For the defence - Hisyam Teh Poh Teik, Naran Singh & Salim Bashir; M/s Teh Poh Teik & Co

Reported by Najib Tamby

JUDGMENT

Azmi Ariffin J:

The Charge

[1] The charge preferred against Siti Aisyah reads as follows:

> Bahawa kamu bersama-sama 4 orang lagi yang masih bebas, pada 13 Februari 2017 jam lebih kurang 9.00 pagi, di Balai Berlepas, Lapangan Terbang Antarabangsa Kuala Lumpur 2 (KLIA2), Sepang, dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, untuk meneruskan niat bersama kamu semua, telah membunuh Kim Chol [Pasport Korea Utara No:836410070] dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 kanun yang sama.

The English translation of the charge will read as follows:

> That you together with four others still at large, on 13th February 2017 at about 9.00 a.m at the Departure Hall Kuala Lumpur International Airport 2 (KLIA2) Sepang, in the District of Sepang, in the State of Selangor Darul Ehsan, in furtherance of the common intention of you all,

did commit murder of one Kim Chol (North Korea Passport No: 836410070) and that you have thereby committed an offence punishable under section 302 of the Penal Code read together with section 34 of the same Code.

[2] The charge preferred against Doan Thi Huong reads as follows:

Bahawa kamu bersama-sama 4 orang lagi yang masih bebas, pada 13 Februari 2017 jam lebih kurang 9.00 pagi, di Balai Berlepas, Lapangan Terbang Antarabangsa Kuala Lumpur 2 (KLIA2), Sepang, dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, untuk meneruskan niat bersama kamu semua, telah membunuh Kim Chol [Pasport Korea Utara No:836410070] dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 kanun yang sama.

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That you together with fours others still at large, on 13th February 2017 at about 9.00 a.m at the Departure Hall Kuala Lumpur International Airport 2 (KLIA2) Sepang, in the District of Sepang, in the State of Selangor Darul Ehsan, in furtherance of the common intention of you all, did commit murder of one Kim Chol (North Korea Passport No:836410070) and that you have thereby committed an offence punishable under section 302 of the Penal Code read together with section 34 of the same Code.

[3] For convenience, in this findings, I will refer Siti Aisyah as the first accused and Doan Thi Huong as the second accused, in the order they were referred to in this court and the deceased Kim Jong Nam as Kim Chol. When reference is to a single accused person, she will be referred to as "the accused" and where reference is to more than one accused person, they will be referred to as the "the accused persons".

[4] I should mention here that the accused persons were separately charged but tried jointly before me. After a total of 34 witnesses testified for the prosecution, the learned Deputy offered 93 witnesses to the defence and closed its case.

The Prosecution's Case

[5] Briefly, the prosecution's case may be summarised as follows:

(i) According to the evidence led by the prosecution, on 13 February 2017, Juliana binti Idris (SP2), who worked as Airport Care Ambassador was on duty at level 3 of the Kuala Lumpur International Airport 2 (KLIA2) departure hall. In her evidence, SP2 said the deceased met her at the information counter and requested her to take him to the police station. The deceased told SP2 that two women attacked him from behind and closed his eyes. He also told her that the two women also rubbed something to his eyes. He also described to her with his hand how he was attacked. SP2 added that she saw the

deceased's hand tremble a bit. The deceased was then taken by SP2 to lodge a police report at KLIA2. There, they met L/Kpl Mohd Zulkarnain bin Sanudin (SP1) at the same level.

(ii) From SP1 observation, he noticed that there was fluid on the deceased's face and his eyes looked slightly red. The deceased was taken to Menara Clinic at level 2. While walking out of the lift from level 3 to level 2, the deceased said to SP1 "sir walk slow, my eye blur, I cannot see". SP1 then slows his movement.

(iii) At the clinic, the deceased was seated at the waiting chair with the medical staff attended to him. Dr Nik Mohd Adzrul Ariff bin Raja Azlan (SP4) arrived and saw the deceased was clutching his head and closed his eyes tightly. The deceased's face was red and he was sweating profusely and he seems to be in pain. SP4's staff then took the deceased's vital signs by using a portable vital signs monitor. Sugar reading was normal. SpO2 was normal. The blood pressure was 220/109 which was very high and dangerous if not treated immediately. He has fast heart rate and the reading was around 120 beats per minute. SP4 also saw the deceased having seizure and his eyes were seen rolling upward and there was drooling of saliva from the deceased's mouth. He was unconscious and not responding to their call. Having observed his condition, the deceased was then taken to the treatment room. Due to his weight which was around 120-140 kg, SP4 and his team was unable to lift the deceased and put him on bed as he is still having seizure. So the first line of treatment of seizure is to give him a supply of oxygen. SP4 did administer adrenaline and atropine to him due to his low heart beat and decreased level of consciousness. Then there was improvement of the reading of the vital sign and SP4 eventually managed to get the pulse reading. It was 90 to 100 beats per minute. It is still on the lower side but better than the previous reading and the saturation was 94%. Even though the deceased was stabilised, but SP4 still needed him to be transferred to the hospital for an ICU setting. The deceased was incubated on the stretcher and eventually transferred to Hospital Putrajaya in a stabilised condition.

(iv) Upon arrival at the Hospital Putrajaya, SP4 received a message from his paramedic and nurse regarding the status of the deceased and according to SP4's staff, they can still manage to get pulse and the oxygen saturation. Subsequently, SP4 was informed that the deceased has passed away.

(v) The post-mortem on the body of the deceased was performed on 15 February 2017 at the Kuala Lumpur Hospital by Dr Mohd Shah bin Mahmood (SP6) and Dr Nurliza binti Abdullah (SP19), the Consultant Forensic Pathologist of the said hospital. Both of them prepared and signed the post mortem report (exh. P20). Internal

examination revealed non specific congestion of the internal organs, associated signs and lung oedema with congestion and evidence of hypertensive with diabetic changes in the kidneys. On analysis for chemical weapons, their joint report (P20) yielded positive detection of the following:

(a) VX (nerve agent) on the swabs of the eye mucosa and face, and in the plasma;

(b) VX degradation products on the swabs of the eye mucosa and face, and in the blood and urine;

(c) VX precursor on the clothing (t-shirt) of the deceased;

(d) VX (nerve agent), its degradation products and precursors on the deceased's blazer; and

(e) VX degradation product on the deceased's brown "Tumi" bag.

(v) Examination also revealed that there was a very significant drop in the blood cholinesterase enzyme level suggestive of an acute exposure to toxic substance such as organophosphorus compounds (cholinesterase inhibitors).

(vii) Finally in their report, both the pathologist concluded that the death of the deceased (Kim Chol) was caused by Acute VX (nerve agent) poisoning.

(viii) The chemist Dr Raja a/l Subramaniam (SP8) who was attached to the Centre for Chemical Weapon Analysis at the Chemistry Department of Petaling Jaya testified that VX is a most deadliest nerve agent ever created by human being. It is the highest rank in term of toxicity for nerve agent. A drop of VX is sufficient to cause death assuming it is pure and enough to cause fatal disruption of nerve system. VX was identified on the swab (face and mucosa) of the deceased and that was in the pure form of VX. SP8 also identified VX on the blazer of the deceased. SP8 also received exhibits belonging to the accused persons. In respect of the exhibit belongings to the first accused, SP8 found degradation of VX ethyl methyl phosphonate acid also known as VX acid on the sleeveless shirt of the first accused but SP8 did not find any evidence of VX or related chemical on the scarf of the first accused. In the case of the second accused, SP8 found VX on the LOL t-shirt of the second accused. SP8 also found precursor of VX (N, N - Diisopropylamino), ethylchloride and ethanethiol on LOL t-shirt. SP8 found degradation product of VX Bis (2-N, N-Diisopropylamino ethyl) disulphide on LOL t-shirt and fingernails cuts. SP8 found degradation, precursor and VX on the sleeve of the t-shirt belonging to the second accused. The presence of degradation

product and the precursor confirmed the presence of VX. According to the study done by SP8, to decontaminate, a person must wash his/her hand within 15 minutes upon contact. Washing hands with water and soap will have the effect of full decon together with physicals scrubbing.

(ix) Apart from the evidence alluded to above, the prosecution also led evidence of several closed circuit television (CCTV) camera footages related to the series of events before and after the death of the victim.

(x) Finally, both the accused were arrested by the police.

(xi) The first accused was arrested by SP16 on 16 February 2017 at about 2.15am in a room at Hotel Flamingo, Ampang. Several of her personal items were also seized.

(xii) As for the second accused, she went back to the scene on 15 February 2017 and was arrested when she came out of the uber car and this was confirmed by SP17.

(xiii) The second accused led the police to her hotel room in Sky Star Hotel where both the LOL t-shirt and the gown were picked up by her and handed over to the police.

[6] Those being the brief facts of the prosecution's case.

Burden Of Proof At The End Of Prosecution's Case

[7] In *PP v. Chang Kok Foo* [2015] 1 LNS 481; [2015] MLJU 576, it was held that:

> ... [12] Section 180(1) of the Criminal Procedure Code stipulates the duty of the court at the end of the prosecution case. It reads as follows:
>
> 180. Procedure after conclusion of case for prosecution.
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the court find that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[8] In *Balachandran v. PP* [2005] 1 CLJ 85 the Federal Court in its judgment delivered by Augustine Paul FCJ observed as follows:

> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[9] In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 the Federal Court laid down the following test to determine whether a *prima facie* case has been established:

> ... what the court is obliged to do under s. 173(f) and 180 of the CPC, is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232. If the answer to the question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[10] To put it shortly, the court must subject the prosecution to a maximum evaluation of the evidence of all the prosecution witnesses in order to determine whether all the essential ingredients have been proven. The maximum evaluation requires the court to scrutinise and evaluate the prosecution evidence with a fine toothcomb. It is a test of credibility and reliability of the prosecution evidence.

The Ingredients Of The Offence

[11] In order to establish a *prima facie* case of murder, it is incumbent upon the prosecution to prove:

(i) The death of the deceased, Kim Chol;

(ii) The death of Kim Chol was caused by the act of the accused persons;

(iii) The accused persons intended by such act to cause death; or with the intention of causing such bodily injuries as the accused persons knew to be likely to cause death; or with the intention of causing bodily and such bodily injuries intended and inflicted were sufficient in the ordinary course of nature to cause death; and

(iv) The act of causing death by the first accused was committed in furtherance of common intention with four others still at large.

(v) The act of causing death by the second accused was committed in furtherance of common intention with four others still at large.

The Evidence

[12] Now, let me proceed to consider each of the ingredients of the offence relied upon by the prosecution to determine whether all the five elements had been established or otherwise.

Ingredient 1; The Death Of The Deceased, Kim Chol

[13] To me, this element does not appear to have been strongly disputed. It is the prosecution's case that Dr Mohd Shah (SP6) together with Dr Nurliza binti Abdullah (SP19) had conducted a post mortem on the dead body named Kim Chol on 15 February 2017 at upon request of the police on 15 February 2017 at 12.45pm. The body of the deceased was identified by the investigating officer, ASP Wan Azirul Nizam bin Che Wan Aziz (SP9). It may be appropriate here to reproduce the relevant parts of the deceased passport which was admitted and marked as exh. P7.

- Passport No	:	836410070
- Sex	:	Male
- Surname	:	Kim
- Given name	:	Chol
- Date of Birth	:	10 June 1970
- Place of Birth	:	Pyongyang

[14] In light of the evidence presented, I have no doubt that the first ingredient has been satisfied.

Ingredient 2; The Death Of Kim Chol Was Caused By The Act Of The Accused Persons

[15] Now, that the first ingredient is settled and put to bed, I shall now turn my attention to the second ingredient.

[16] To establish this ingredient, the prosecution had to rely heavily on the evidence contained in the CCTV footages and the images of the accused persons produced from it even though certain images may seem to be quite unclear. I am mindful of the position that CCTV footages presented in court are not the actual recording of what actually took place at the time of the incident but in law they are still document produced by a computer as prescribed under s. 3 of the Evidence Act 1950. It follows that all the CCTV footages tendered in this court must satisfy the requirement of s. 90A of the Evidence Act 1950 before it can be admitted in evidence. As this had been done by the prosecution, it can be safely concluded that all the CCTV footages (exhs. P44 - P64 & P66 - P69) were admissible as evidence in the trial except ID65 which showed the first accused seated in a restaurant at KLIA2 in handcuffs while being escorted by a few policewomen. I ruled that ID65 could not be played or admitted as evidence because of its prejudicial effects as it was made after the first accused had been arrested. I must disallow the admission of such evidence because it would operate unfairly against the first accused.

[17] Be that as it may, on the evidence before me, SP26 - SP31 had explained in detailed how they extracted the relevant images from the main computer and copied them to disc. Thus having considered their testimony in totality, I find no reason to doubt or disbelieve their veracity or accuracy of their evidence and hold that they are truthful witnesses. As such, I am satisfied as to the authenticity and originality of the CCTV footage exhs. P44 - P64 and P66 - P69.

[18] Based on the CCTV footage, I have no hesitation in concluding that the accused persons were present at the KLIA2 departure hall on the morning of 13 February 2017 along with the other four still at large. What therefore remains for consideration is whether the accused persons were the perpetrators who were said to have attacked and smeared the deadly VX nerve agent on the face of Kim Chol leading to the death of the victim within a few hours. Were there any evidence or supporting evidence connecting the accused persons with the crime? Evidence revealed that at the time of the attack, the images of the accused persons and their action produced from CCTV footage (exh. P50) seem to be quite unclear. Furthermore, it must be added that it is a non disputed fact that not a single eyewitness gave evidence of having seen the accused persons attacking the deceased at the airport. Therefore, the case for the prosecution in so far as the actual acts of killing are concerned, rests entirely on the evidence of the CCTV footages, which is timely for me to deal with now.

[19] From the CCTV clips that were played in court and admitted in evidence, the CCTV footages will show the series of events related to the murder. Amongst others, they are as follows:

(i) On 13 February 2017 at 7.57am - second accused was seen walking with Mr Y at level 3 Green Zone. The second accused was seen at KLIA2 since 6:59am prior to the attack (see DVD 7 exh. P45);

(ii) On 13 February 2017 at 8.10am - first accused was seen having conversation with Mr Chang at Bibik Heritage at level 3 (see DVD 19 exh. P46);

(iii) On 13 February 2017 at 8:59:29am - Kim Chol was seen entering the Green Zone and walking towards the self-check-in kiosk at level 3 (see DVD 1 exh. P50);

(iv) On 13 February 2017 at 9:14am - an image of a woman wearing white t-shirt was seen approaching Kim Chol and appears to put her hands over his face from behind. I must say with certainty that the image of another woman act could not be clearly seen from the video clips (see DVD 1 exh. P50);

(v) On 13 February 2017 at 9:15am - image of a woman in a white t-shirt and another woman hurriedly left the scene in a different direction immediately after the incident (see DVD 1 exh. P50);

(vi) On 13 February 2017, at 9:06:50am - Kim Chol went to the information counter at level 3 and was seen communicating with SP2 and describing something to her using both his hand onto his face (see DVD 4 exh. P48);

(vii) On 13 February 2017, at 9:07:46am - image of Kim Chol seen together with SP1 & SP2 (see DVD 4 exh. P48);

(viii) On 13 February 2017 at 9:02:43am - second accused entered the toilet near Menara Clinic at level 2 (see DVD 3 exh. P49);

(ix) On 13 February 2017 at 9:03:56am - second accused came out from the toilet (see DVD 3 exh. P49);

(x) On 13 February 2017 at 9:13:15am - first accused was seen outside the toilet area at level 2 (see DVD 14 exh. P47);

(xi) On 13 February 2017 at 9:14:54am - first accused while walking was seen taking out a scarf from her handbag at level 2 near the ATM machine (see DVD 14 exh. P47);

(xii) On 13 February 2017 at 9:23:14am - second accused was seen waiting for a taxi at the Transportation Hub at level 1 (see DVD 19 exh. P46);

(xiii) On 13 February 2017 at 9:26:21am - first accused was seen waiting for a taxi at the Transportation Hub at level 1 and took a taxi and left KLIA2 (see DVD 19 exh. P46).

[20] From the chronology of events referred to and having reviewed the material placed before me, for the purpose of comparison, it can be obviously seen that prior to the attack, the first accused appears to be calm, cheerful and in a relax mode. But immediately after the attack 'another woman' which I without hesitation conclude to be the first accused was seen hurriedly taking an escalator heading towards level 2 and putting her hands up. I accept the fact that there was no evidence to show that she had entered the toilet. She was only seen outside the toilet area at level 2 (see DVD 14 exh. P4). She was then seen walking near the ATM machine at level 2 with her hands down. She doesn't seem to be in a rush and was walking at a leisurely pace.

[21] As for the second accused, immediately after the attack, she was seen walking fast towards Starbuck at level 3 (see DVD 4 exh. P48) putting both her hands up and quickly entered the toilet near Menara Clinic a level 2 (see DVD 3 exh. P49). She spent approximately 1 minute and 13 seconds in the toilet (see DVD 3, exh. P49). When she came out from the toilet, both her hands are down. She was also seen walking at a slow and more relaxed pace. While walking, she was seen using her handphone.

[22] To my mind, their pattern of conduct seems to be identical and not a mere coincidence. For this, it may fairly be inferred that their movements were deliberate as they walked towards the deceased to wipe him out with all the calculated speed done with or marked by full consciousness of the nature and effects of their action.

[23] Premises on the evidence adduced, even though it can be seen that there was just a fleeting glimpse of two women doing something to Kim Chol and the 'attack' was not clearly captured by any of the CCTV footage, the evidence pointing to the simultaneous 'attack' on the eyes of the deceased by the accused persons can be inferred from the facts and surrounding circumstances, subsequent conduct of the accused persons immediately after the attack and other supporting and forensic evidence such as VX found on the sleeveless shirt of the first accused and on the t-shirt LOL and fingernails cuts of the second accused. I find that on the strength of the evidence adduced by the prosecution, these are the reasonable inference and conclusion that can be made in the light of the evidence presented in court. There are ample evidence to support the above finding. Traces of VX nerve agent were also found on Kim Chol's face, eyes, clothing, blood and urine. Expert witnesses had also testified that traces of VX were found on the clothing of both the women, while Kim Jong Nam suffered seizures and it does show symptoms of nerve agent poisoning before his death. The inevitable conclusion from all these will attract criminal culpability pursuant to s. 114 Evidence Act 1950 which states as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

[24] In dealing with the similar issue, I wish to quote what was said by the court in *Ahmad Najib Aris v. PP* [2007] 2 CLJ 229 where Abdul Aziz Mohamad JCA (as he then was) spoke for the panel had this to say:

> The evidence when considered in its entirety, leads only to one conclusion, that it was the appellant and no one else, who was responsible for what happened to the victim that night.
>
> The presence of the victim's bloodstains on the appellant's trousers proves that the appellant was with the victim at least after she started to bleed. The presence of much blood of the victim on the rear seat of the Proton Tiara proves that the cause of bleeding took place when the victim was in the back seat of the car, where she was, according to Azizam's evidence, at about 1 am on 14 June 2003. From those proofs and the complete absence of a possibility of the involvement of another person, the inevitable conclusion to be drawn is that it was the appellant who caused the bleeding, applied the ligature to the victim's neck and tied her wrist, although not necessarily in that order and placed her in the manhole and set fire to her or her body. That inevitable conclusion does not require proof of the link between fabric around the neck or wrist with the appellant, but such proof as there was, which cannot be described as feeble, contributes to demonstrate physically the correctness of the inevitable conclusion.

[25] Taking the evidence cumulatively, I am of the firm view that the accused persons were the perpetrators leading to the death of Kim Chol.

Ingredient 3; Intention To Cause Death

[26] The thrust of the second accused's submission was that she did not have the intention to cause death or the necessary knowledge that her action would cause death. On the other hand, the first accused denied she was one of the assailants who had "attacked" the deceased. This primary issue was argued at great length by the parties.

[27] It has often been observed, that it is difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fah Sang v. PP* [1967] 1 LNS 80; [1967] 2 MLJ 163; *Lim Heng Soon & Anor v. PP* [1969] 1 LNS 93; [1970] 1 MLJ 166; *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197; [1981] 1 MLJ 84; *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232; *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151). Hence "intention is a matter of inference" (*Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159 at 176, per Raja Azlan Shah FJ, as HRH then was). "A man's intention is a question of fact and it can be gathered from his acts". (*Ratanlal & Dhirajlal ibid* p. 1296). Intention can be inferred from the act or conduct or other relevant circumstances of the case (*Juraimi Husin v. PP* [1998] 2 CLJ 383). Intention to kill can be inferred from the nature of the injuries sustained by the deceased (*Sainal Abidin Mading v. PP* [1999] 4 CLJ 215). "Intention must be inferred not merely from the natural consequences of his act, but from the act itself, and as the natural consequence of an act of the kind in question would be death" (*Ratanlal & Dhirajlal ibid* p. 1304).

[28] Willian CJ (as he then was) said in *Hashim Mat Isa v. PP* [1950] 1 LNS 23; [1950] MLJ 94:

> A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proved intention or knowledge as required by that section set out in the definition.

[29] Perhaps, I should also refer to the case of *Mohamed Yasin Husin v. PP* [1976] 1 LNS 75; [1976] 1 MLJ 156 p. 157 where the Privy Council held that:

> he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause death of a normal human being of the victim's apparent age and build even though he himself may not have had the sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

[30] In support, the Court of Appeal in the case of *Mohd Bakri Belaho v. PP* [2008] 2 CLJ 240; [2008] 1 MLJ 190 stated as follows:

> [70] Combining the effect of the weapons used in the incident, together with the nature of the wounds inflicted, the part of the body on which the injuries were inflicted, with the probability of death resulting being high, everything pointed to an intention to cause death or injury sufficient in the ordinary course of nature to cause death. From the severity of the wounds as caused by that chopper and the other knife for stabbing purposes, the appellant could not now come forward and say that he was unaware that those wounds would in all likelihood have caused death, let alone that they were accidental or unintended.

[31] It would now be necessary for me to consider whether on the evidence tendered, the element of intention could be attributed to the accused or whether an inference of intention can be drawn against the accused persons including the reaction of both the accused before and immediately after the commission of the offence since it can have a direct bearing on the fact in issue.

Juliana binti Idris (SP2) testified that:

> Pada jam di antara 9.00 - 9.10 pagi (13 February 2017) terdapat 2 orang yang serang dia pada masa itu. Si mati memberitahu saya dia telah diserang oleh perempuan yang pegang dia daripada belakang dan menutup matanya. Perempuan itu ada sapu something pada matanya.

L/Kpl Mohd Zulkarnian bin Sanudin (SP1) testified that:

> Pada 13 February 2017 jam 9.00 pagi saya telah didatangi oleh SP2 dan si mati kerana SP2 memberitahu bahawa lelaki tersebut telah di sapu di bahagian muka oleh 2 orang perempuan yang tidak pasti bangsa nya. Dalam perjalanan ke Klinik Menara dan setelah keluar daripada lif tersebut, si mati berkata kepada saya 'sir, walk slow, my eye blur, I cannot see'.

[32] The first medical officer who attended to the deceased is Dr Nik Adzrul bin Raja Azlan (SP4). On seeing him, SP4 saw him clutching his head and closing his eye tightly. The deceased's face was very red and he was sweating profusely. He also seems to be in pain. The blood pressure was 220/109 which is very high and dangerous if not treated immediately. The heart rate was around 120 beats per minute and it is a fast heart rate. He was also having a seizure and his eyes were rolling upward. There was also drooling of saliva from his mouth. His nostril was a bit watery. SP4 did administer adrenaline and atropine to the deceased. After the seizure stop, SP4 did check the three vital signs. The blood pressure was 70/40 and it is considered dangerous especially when the previous reading was 220/109. The sudden drop of blood pressure is displayed by those who were experiencing shock but not hemorrhagic shock because there was no bleeding. After SP4 gave medication, the deceased was also given a high flow mask to further increase the oxygen. Sp02 increased around 60 to 67% and the blood pressure reading was 92/70. After administering atropine and adrenaline, there was improvement of the reading of the vital signs and eventually SP4 and his team managed to get the pulse reading. It was 90 to 100 beats per minute.

[33] Dr Raja a/l Subramaniam (SP8) who heads the Malaysian Government's Centre of Chemical Weapon Analysis, said he found VX in its pure form and VX precursors on Huong's and said that:

> Based on study if we decon within 15 minutes i.e washing with water most likely we would not see any effect or some delayed effect of VX. This study is based on human being.

[34] SP8 proceeded to say that:

> Palm is least sensitive to have the same effect because it has less blood proximity and more fat which make it more difficult for VX to penetrate through palm skin. Based on literature, person who are exposed to VX within the right dosage and the right penetration route will die within minutes.

[35] SP8 further said that the best method of assassinating someone would probably be applied on the eyes and the skin of the neck. This is based on literature because the route of entry is very fast through the eye. SP8 marked "O" on the blazer of the deceased where the mark represents positive identification of VX. In SP8's opinion, VX degradation product or precursor were found on the face and the eye mucosa of the deceased because most likely the deceased has wiped the chemical on the face and eye using the collar and sleeves of the blazer.

[36] SP8 added that he also received exhibits belonging to accused persons. In respect of the exhibit of the first accused, SP8 found degradation of VX ethyl methyphosphonic acid also known as VX acid on her sleeveless shirt. But SP8 did not find any evidence of VX or related chemical on the scarf of the first accused.

[37] In the case of the second accused, SP8 found VX on her LOL t-shirt. SP8 also found precursor of VX (N,N-Dissopropylamino), ethylchloride and ethanethiol on LOL t-shirt. SP8 found degradation product of VX Bis (2-N,N- dissopropylaminoethly) disulphide on LOL t-shirt and fingernails cuts. SP8 found degradation, precursor and VX on the sleeve of the t-shirt belonging to the second accused. The presence of degradation product and the precursor confirmed the presence of VX. SP8 also confirmed that he found VX on Kim Chol face, eyes, clothing, and blood and urine.

[38] Intention to kill can be inferred when the focus of their attack was only on the eyes of the deceased because based on the evidence presented, the route of penetration was very fast through the eyes compared to hand and feet which ultimately caused the death of the deceased only one and half hour after the attack. It can also be inferred that the act of the accused persons is not only consistent with them knowing the strategic contact point to attack but the use of VX as a chemical weapon is sufficient enough to cause death. It also indicated the degree of deliberation on the part of the accused persons in carrying out their act.

[39] After the attack, the accused persons have to be very quick to wash their hands. The CCTV footage did not even show that first accused had entered the toilet but she was seen lingering outside the toilet area at the magazine level. It could safely be inferred that the first accused was in the toilet even though her entry and emerge was not captured by any of the CCTV after taking into consideration the series of events that cover both her antecedent and subsequent conduct. On the other hand, the second accused was seen entering the toilet at the second level at 9:02am and she came out from the toilet at 9:02:43am. The second accused spent about one minute and nine seconds in the toilet. There is no slightest doubt in my mind that it can be inferred that their desperate act rushing to the toilet was solely for the purpose to decontaminate the poisonous VX on their hands. This further established their intention to cause death.

Ingredients 4 & 5; Common Intention

[40] I now move on to consider the question of common intention where I have combined ingredient 4 and 5 together. Learned counsel for the accused persons had strenuously challenged that there was absolutely no evidence of common intention on the part of the accused persons with the four North Korean still at large. I must admit that the counsel's argument on this core issue appears attractive. To deal with the issue, let me reproduce below s. 34 of the Penal Code. This section reads as follows:

> When a criminal act is done by several person, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[41] There are host of authorities dealing with the law on s. 34 of Penal Code.

[42] Way back in 1983, His Lordship Hashim Yeop A Sani (as he then was) in *PP v. Dato' Mokhtar Hashim* [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 said (at p. 749):

> Under section 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case. (see *Mahbub Shah v. King Emperor* [1945] 72 I.A. 148,153).

[43] Then, His Lordship continued:

> It is also a common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege and perhaps prove, that his individual act did cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined.
>
> Thus it is clear that the leading feature of section 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirement of section 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence. Even passive participation may require physical presence.

[44] The Court of Appeal in *Ahmad Majmi Idris & Anor v. PP* [2014] 1 LNS 148 explained the law on the application of s. 34 of the Penal Code in language that merits recollection:

> ... In our judgment, when section 34 of the Code is invoked, there is no requirement to prove who actually or ultimately caused the death of the deceased as was held in *Ong Chee Hoe v. PP* [1999] 4 SLR 688 as follows:
>
> > In any case, the effect of invoking section 34 made it unnecessary to determine who exactly the actual doer of the offence in question was.

[45] In the Privy Council decision of *Barenda Kumar Ghosh v. Emperor* AIR 1925 PC 1, the court stated:

> Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[46] In a somewhat similar situation, the Supreme Court in *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336 speaking through Syed Agil Barakbah SCJ (as he then was) set out the law to be applied on the question of common intention. The words still ring in our ears where His Lordship said (at pp. 251-252 (CLJ); pp. 344-345 (MLJ)):

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (see the Supreme Court (of India) on *Criminal Law* 1950-1960 by J.K Soonavala page 188 to 193).

[47] In *Farose Tamure Mohd Khan v. PP & Other Appeals* [2016] 9 CLJ 769; [2016] 6 MLJ 277 where Raus Sharif PCA (as he then was) delivering the judgment of the Federal Court said at pp. 788 & 789 (CLJ); pp. 294 & 295 (MLJ).

> [47] It is helpful to analyse s. 34 in terms of these elements;
>
> (a) a criminal act;
>
> (b) participation in doing of the act;
>
> (c) a common intention between the parties; and
>
> (d) the act must be done in furtherance of the common intention.
>
> [48] At this juncture, it is convenient first to address the generally accepted principles on the operation of s. 34. The position in respect of these elements is fairly uncontroversial, and the relevant principles gleaned from the authorities in Malaysia, Singapore and India can be briefly dealt with.
>
> [49] It is widely acknowledge that s. 34 is a rule of evidence which embodies the common sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually (*Krishna Rao a/l Gurumurthi v. Public Prosecutor And Other Appeal* [2009] 3 MLJ 643).
>
> [50] If it is shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone (*Mahbub Shah v. Emperor* AIR 1945 PC 118).

[51] The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them (*Hari Ram v. State of Uttar Pradesh* [2004] 8 SCC 146). In those circumstances, the law makes no distinction between them or between the parts played by them in doing the criminal act (*Bashir v. State* AIR 1953 All 668).

[52] Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence (*Sabarudin bin Non & Ors v. Public Prosecutor* [2005] 4 MLJ 37 and *Manikumar Sinappan & Ors v. Public Prosecutor* [2015] MLJU 1956; [2016] 3 MLRA 1.

[53] Common intention, distinguished from the same or similar intention, requires proof that the criminal act was done in pursuance of a pre-arranged plan (*Mahbub Shah*). Such pre-planning may develop on the spot or in the course of commission of an offence, the crucial test being the plan must precede the commission of the offence ((1) *Namasiyiam (2) Rajindran (3) Goh Chin Peng* and (4) *Ng Ah Kiat v. Public Prosecutor* [1987] 2 MLJ 336).

[54] A common intention may be often be difficult to prove by way of direct evidence in practice, but it can be inferred from the circumstances of the case and the conduct of the accused (*Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232).

[48] Then, His Lordship continued at pp. 793 & 794 (CLJ); p. 299 (MLJ):

... we still hold the view which had been widely accepted by our courts that in a criminal prosecution where s. 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted to the commission of a crime actually committed, s. 34 can operate against all persons involved in the commission of the actual crime.

[66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because common intention is essentially a state of mind. Invariably inferences have to rely upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.

[49] Having laid down the principles of law on s. 34 of the Penal Code, I will now come to the main issue which is crucial to the accused's case ie, whether the accused together with the four others still at large had the common intention to cause death. The four others who are not named in the charge have been identified by the investigating officer (SP9) as:

(i) Mr Y - Mr Ri Ji Hyon

(ii) Mr Hanamori - Mr Ri Jae Nam

(iii) Mr Chang - Mr Hong Song Hac

(iv) Mr James - Mr O Jong Gil

[50] I will deal with this issue in brief. Learned counsel raised the point that the accused persons cannot be said to have shared the common intention with the four North Koreans to cause the death of the deceased. SP9 agreed in cross-examination that the first accused was seen having conversation with Mr Chang (Mr Hong Song Hac) at the airport, while the second accused was seen together with Mr Y (Mr Ri Ji Hyon). In short, counsel for the first accused argued that other than Mr Chang, there was no evidence to show that the first accused knew Mr Y (Mr Ri Ji Hyon), Mr Hanamori (Mr Ri Jea Nam) and Mr James (Mr O Jong Gill). Neither there was evidence to show that the first accused knew the second accused. Thus, there was no prior concert or meeting of mind amongst them to do a criminal act pursuant to a pre-arranged plan. Finally, counsel for the second accused also contended that SP9 had agreed in cross-examination that the second accused had not met or spoken with both Mr Chang (Mr Hong Song Hac) and Mr James (Mr O Jong Gill) whilst the involvement of both Mr Y and Mr Hanamori have been explained by the second accused in her s. 112 statement (exh. D211).

[51] It can be seen from the CCTV footage that the four North Koreans were presence at KLIA2 on 13 February 2017. What were they doing there? Having considered the conduct of the four North Koreans before and after the commission of the crime, it is manifest that these four persons did play a substantial role throughout this fatal encounter. They are not just a mere bystander but they are part of the chain that led to the murder of the deceased even though they have not lifted a finger on the deceased.

[52] It was the submission of learned counsel that mere present of the accused at KLIA2 cannot amount to common intention. I find myself entirely in agreement with the learned counsel's statement but that alone cannot be read in isolation because the totality of the fact and evidence must be taken into consideration including the chronology of the events leading to the death of the deceased. Stretching the matter a little further, I accept the fact that it is virtually impossible to directly prove a pre-arranged plan between the parties. Common intention is a question of fact. The proof of common intention is the matter of inference from the circumstances. It is to be derived from the conduct of the two accused and the four still at large.

This inference can be gathered when the accused persons were separately seen together with the two North Koreans ie, Mr Chang and Mr Y respectively before the attack, the manner the accused persons mounted the attack, the deadly substance used, the concerted conduct subsequent to the commission of the offence where finally both the accused took a taxi and left KLIA2. But that is not the end of the matter. I have also taken into consideration that the four North Koreans immediately after the attack changed their clothes to disguise themselves and left Malaysia three hours after the incident. In the upshot, the best evidence to establish common intention is to look at their conduct prior to, at the time of and after the offence. All these acts when combined together proved that their common intention to murder stands even though all of them were not physically seen together in a group.

Other Contentious Issues

[53] Before me, the first accused was represented by one law firm (Tetuan Gooi, Azura and Associate) whereas for the second accused, three different counsels appeared for her. I commend the accused's learned counsels and the learned Deputy Public Prosecutor for their effort in raising several other critical issues of law that require mature consideration and deliberation. I will address each of these pressing issues accordingly. However, there are also other ancillary issues submitted in the course of the respective submission by the parties. However, I am not inclined to dwell on any of them. My views on them would have no effect on my finding at the end of the prosecution's case.

Admissibility Of Exhibits D176, D177, D186 And D193

[54] Those documents are as follow:

No.	Exhibits	Date Tendered	Sources
1.	D176 - Screenshot Facebook 1st accused	14/03/2018	Facebook
2.	D177 - Screenshot Facebook 1st accused	14/03/2018	Facebook
3.	D186 - Screenshot Facebook first accused	14/3/2018	Facebook
4.	D193 - Screenshot Facebook first accused	14/3/2018	Facebook

[55] The prosecution objected to the tendering of these exhibits due to the following reasons:

(i) These exhibits are inadmissible under s. 5 of the Evidence Act 1950 due to its relevancy;

The prosecution submitted that all the four documents are irrelevant to disprove the charge against the first accused as it will not change the evidence adduced by the prosecution that the first accused was the

person shown on the CCTV footage who had caused the death of the deceased. Moreover, these screenshots were not posted on Facebook on the day the incident took place. Thus, with or without these exhibits, the prosecution had proved that the "*actus reus*" was done by the accused persons.

(ii) The acceptance of these documents does not fulfill the procedure provided under the law;

The prosecution submitted that the maker of the document or the person who printed out the document must be called as a witness but neither of this was done by the defence counsel for the first accused. Hence, without this piece of evidence, the authenticity of D176, D177, D186 and D193 is still in question. Furthermore, it shall only be admissible as evidence if it was produced by a computer in the course of its ordinary use as provided under s. 90A of the Evidence Act 1950.

[56] The Court of Appeal in the case of *Mesnayo Longdi v. PP* [2015] 1 LNS 1156 at p. 10 opined that:

> [30] Firstly, we need only say that in law a Certificate under section 90A(2) was not the only method to prove that a document was produced by a computer 'in the course of its ordinary use' under section 90A(1) EA. *The fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under section 90A(2) or by oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but* of also the matters presumed under section 90A(4) (good working order). (see Federal Court in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 which approved the analysis of section 90A by Augustine Paul JCA (as he then was) in *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269.)

[57] Justice Shaik Daud Ismail JCA (as he then was) in the case of *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6 had this to say at p. 7:

> [2a] "Sub-section (1) of s. 90A allows the production of computer generated documents or statements if there is evidence, firstly, that they were produced by a computer, and secondly, that the computer produced them in the course of its ordinary business. However, once the prosecution adduce evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s. (2), as sub-s.(6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[58] Further on, he added at pp. 17-18:

> On reading through section 90A of the Act, we are unable to agree with the construction placed by learned counsel. First and foremost, section 90A which had seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated earlier,

> section 90A was added to the Act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. On our reading of this section, we find that under subsection (1), the law allows the production of such computer-generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. *In our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by subsection (2). Thus, subsection (2) is permissive and not mandatory. This can also be seen in subsection (4) which begins with the words 'Where a certificate is given under sub-section (2).*

[59] With the same view, Mahadev Shanker JCA (as he then was) in the same case said at p. 8:

> [1] Section 90A was enacted to bring the "best evidence rule" up to date with the realities of the electronic age. The effect of s. 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court provided he did so in the course of the ordinary use of the computer.

[60] These authorities propelled me to reconsider the issue of admissibility of these four documents.

[61] On the available evidence, it is undisputed that these four documents fall within the category of documents as prescribed under s. 3 of Evidence Act 1950 and therefore it must follow the procedure and requirements under s. 90A of Evidence Act for it to be admitted as evidence. There was no issue that the first accused's handphone was in good working order and that documents were produced "by the computer in the course of its ordinary use."

[62] I am of the view that s. 90A(2) of the Evidence Act is not the only method to prove that a document was produced by a computer "in the course of its ordinary use". By referring to the case of *Gnanasegaran Pararajasingam v. PP* (*supra*), it can be said that producing certificate under s. 90A(2) of Evidence Act is only permissive and not mandatory. Therefore, the failure by the defence to tender the certificate under s. 90A of Evidence Act is not fatal.

[63] Be that as it may, by referring to the note of proceeding dated 14 March 2018, these four exhibits ie, D176, D177, D186 and D193 were positively identified by the investigating officer (SP9) and that these four screenshots from the first accused's Facebook were the same as original contained in the first accused's Iphone (exh. 106B). Thus, the oral evidence by SP9 confirming the content in the first accused's handphone is sufficient to fulfill the requirement under s. 90A of Evidence Act. With that, D176, D177, D186 and D193 should remain as exhibits at this stage. As such, there was no necessity for me to reverse my earlier ruling on this issue.

Adverse Inference Under s. 114(g) Of The Evidence Act 1950

[64] Learned counsel submitted that the prosecution ought to have called the OCCI of Selangor (SAC Ahmad Fazil bin Ahmad) as a witness. According to the learned counsel, the absence of his evidence had resulted in prosecution falling short of proving a *prima facie* case even though at the end of the prosecution case, he was made available to the defence.

[65] With due respect, I do not agree with that submission. It is significant to remember that SP9 had said that all his action must be referred to the OCCI and that he was not allowed to carry out investigation of the case without instruction from the OCCI but that does not make the OCCI a material witness in the real sense of the word. It is not denied that the OCCI do play a role in the investigation conducted by SP9 as this involved a high profile case. But what is obvious is that SP9 was the one who play a major role in wide range of evidence gathering, interview and record statement from witnesses, collecting of appropriate medical and forensic evidence, compared to what was undertaken by the OCCI. To me, the OCCI cannot be put on the same footing as SP9. Thus the failure to call the OCCI who is not a key witness has not weakened the prosecution case.

[66] Yet other persons named by the learned counsel whom the prosecution has also failed to call as a witness was Dessy and Raisa where it was alleged by the defence that both of them were present in room 356 when SP16 recovered the sleeveless shirt. However, these two witnesses were only offered to the defence.

[67] In my view, it was not necessary for the prosecution to call everybody involved or named in the case to prove its case against the accused persons. The prosecution has a complete discretion as to the choice of witnesses to be called at the trial. Its duty is only to call all material witnesses essential to the unfolding of the narratives of the prosecution case (see *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433.

[68] For clarity, it is appropriate here to briefly refer to that portion of the evidence of SP16 during his cross-examination, *inter alia*:

> Saya tidak setuju dengan cadangan peguam apabila serbuan di buat Dessy (yang juga dikenali sebagai Mey) dan Raisa (yang dikenali sebagai Wati) ada bersama dengan OKT1 pada masa itu.
>
> Saya juga tidak setuju dengan cadangan peguam apabila serbuan dibuat May dan Wati sedang baring di atas katil dan hanya Tertuduh Pertama yang duduk di atas katil itu.

[69] Based on the answer given by SP16, the argument raised by the defence to portray the significance of these two persons who ought to have been called by the prosecution must be rejected. No doubt that the defence had mentioned their names during cross-examination of SP16. But that does

not mean that the prosecution must call them as a witness having regard to the evidence before the court. I find no merit in the complaint on this issue. Furthermore, these suggestions were denied by SP16. In this regard, it was observed in *Emperor v. Karimuddin Sheikh* AIR 1932 Cal 373 where the court said:

> Mere suggestion by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either party or wholly accepted by the witness for prosecution.

[70] With much respect, I am unable to consider these suggestions as evidence at this stage of the trial.

[71] Now, on the invocation of s. 114(g) of the Evidence Act 1950 against the prosecution for its failure to call other witnesses such as Hyon Kwang Song, Kim Uk II, Ri Jong Chol, Ri Ji U, various authorities have stated, namely that, only failure to call a material witness may attract the invocation of such provision (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221.

[72] In my view, the failure does not smack any oblique motive or any suppression or withholding of evidence on the part of the prosecution. Indeed, it is not in all cases where there is an act complained of or a failure or omission to produce or adduce evidence that section is relied upon. Only in cases where there has been an intentional suppression of material on crucial evidence that it may be invoked (see *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 at p. 254).

[73] Furthermore, those named persons/witnesses were not necessary or essential to the unfolding of the narratives of the prosecution case because the degree of their participation in this case is minimal ie, they only played a supportive role to assist and to facilitate the escape of the four persons at large. There was no evidence to show that they were presence at the scene of the crime and assisted the four North Koreans still at large in committing the crime. In short, some of these witnesses are clearly accessories after the fact. Thus, there was no necessity in calling them as witnesses or for that matters, offering them to the defence.

Whether The Affidavits Of Nguyen Bich Thuy (Thuy) And Nguyen Manh Quang (Quang Bek) Are Admissible

[74] Through the investigating officer (SP9) the defence tendered the affidavits of Thuy and Quang Bek. They were marked as follows:

(i) Affidavits of Thuy affirmed on 6 October 2017 - IDD 214 (A);

(ii) Further affidavits of Thuy affirmed on 23 January 2018 - IDD 214 (C);

(iii) Affidavit of Quang Bek affirmed on 6 October 2017 - IDD 223; and

(iv) Further affidavit of Quang Bek affirmed on 23 January 2018 - IDD 225.

[75] Thuy in her affidavits has expressed that she was unable to come to Malaysia to give evidence. This is what she had affirmed:

(i) I need to help my husband to manage Hay Bar, which is open for business every day. It is our only source of income;

(ii) I have a young son who is five years old. I need to look after him when I am not working at Hay Bar; and

(iii) My husband does not allow me to come to Malaysia.

[76] As regard to Quang Bek affidavits, he affirmed that he was unable to attend to the Malaysian court because of work commitments.

[77] It is unfortunate to say that the reasons given by both the deponents (Thuy and Quang Bek) for not being able to come to Malaysia and give evidence in this court appears to me to be rather odd, unreasonable and totally unacceptable.

[78] With respect, I am unable to see any justification or to accept such flimsy excuses given by them. In the circumstances, IDD 241(A), IDD 214(C), IDD 223 and IDD 225 cannot be admitted as exhibits under s. 32 of the Evidence Act 1950.

[79] Further, I would like to add that these four documents come into the picture purely for identification purpose. As such, it should be excluded as part of the trial record.

Break In The Chain Of Evidence

[80] It is clear from the evidence of SP16, he recovered the sleeveless shirt together with other exhibits from room 356 at Flamingo Hotel and put them in a black plastic. But the said plastic bag was not tendered in court neither was it mentioned in Borang Serah Terima (exh. P96) when it was handed over to the investigating officer (SP9). On the contrary, SP9 testified that he receives the sleeveless shirt in a transparent plastic. In the circumstances, it was argued that there is a break in the chain of evidence in regard to the sleeveless shirt.

[81] The material portions of SP16's evidence in re-examination are as follow:

> beg plastik hitam tidak dikemukakan dalam Borang Serah Terima kerana ianya bukan barang rampasan.

[82] From the answer given by SP16, it is clear that the plastic bag was not one of the exhibits seized. Therefore, failure to tender the plastic bag had not caused any serious break in the chain of evidence relating to the identity of the exhibits. It all depends on the facts and the central issue will relate to credibility of the witness/witnesses and not the exhibits *per se*.

[83] To me, what has to be proved is the sleeveless shirt that was recovered and analysed by the chemist (SP8) even though the existence of the plastic bag was never tendered and marked as an exhibit. After careful analysis of the evidence, I am of the view that the contention by the learned counsel is misconceived.

Dying Declaration

[84] I now turn to consider the argument mounted upon the issue of dying declaration. On the subject of dying declaration, textbook writers have this to say: *Phipson on Evidence* (13th edn) at p. 345 was of the view that at common law:

> ... cases recognising that where a witness is dead, it may be better to admit evidence of what he said than to deprive the court of all proof.

[85] To express our understanding of the law on dying declaration, s. 32(1) of the Evidence Act 1950 specifies certain condition which must be satisfied before statements made by person who cannot be called as witnesses are permitted. One of such conditions is that the maker is dead. Section 32(1)(a) of the said Act provides that statement made by a person as to the cause of his death circumstances of the transaction which resulted in his death are admissible if relevant.

[86] Secondly, the statement must not be in summary form. In short, the statement, no matter how short must not be summarised by anyone, but must be given word for word as given by that dying person.

[87] Next, I shall now advert to the evidence of SP1 and SP2.

[88] In his examination-in-chief, SP1 told the court that:

S : Apakah laluan yang kamu gunakan untuk pergi ke Klinik Menara ini?

J : Semasa di Aras 3 Perlepasan KLIA2 untuk turun ke Aras 2 Ketibaan KLIA2, saya telah menggunakan lif.

S : Ada kamu bercakap dengan lelaki ini?

J : Mohon soalan diulang.

S : Semasa kamu gunakan lif untuk ke Klinik Menara, sepanjang perjalanan itu ada kamu bercakap dengan lelaki ini?

J : Semasa keluar dari lif di Aras 2 Ketibaan KLIA2, lelaki tersebut telah berkata kepada saya "**sir, walk slow, my eyes blur. I cannot see**."

S : Saya yakin En. Zul faham apa yang dicakap oleh lelaki ini.

J : Saya faham simple English sahaja.

S: Selepas si mati ini bercakap "sir, walk slow, my eyes blur. I cannot see", apa yang kamu buat?

J : Selepas lelaki berkata, saya mula memperlahankan pergerakan saya dan membiarkan lelaki tersebut berjalan di hadapan saya.

[89] SP2, during the examination-in-chief said:

S : First sekali dia jumpa awak di customer service counter, apa yang berlaku?.

J : Dia beritahu dia diserang oleh perempuan yang pegang dia daripada belakang dan menutup matanya. Perempuan itu ada sapu something pada matanya.

S : Ada dia beritahu berapa orang yang serang masa itu?.

J : 2 orang.

S: Dia cakap dalam bahasa apa?

J: English.

S: Boleh beritahu Mahkamah macamana dia cakap? Adakah awak fasih dalam bahasa English?

J: Saya fasih tetapi hendak cakap balik exactly macam dia cakap, saya tidak berapa ingat tetapi saya ingat maksudnya.

S: Taraf pendidikan puan sampai mana?

J: SPM.

S: Awak faham apa yang dia maksudkan?

J: Faham.

S: Bagi perkataan "diserang", adakah dia sebut dalam bahasa Inggeris diserang ataupun apa yang puan faham?

J: Dia kata dia "**attack by women from behind and another one close matanya**" sebab dia buat sekali dengan tunjuk pergerakan tangannya.

S: Selain daripada dia cakap diserang, attack, dia tunjuk lagi dengan tangan?

J: Dia tunjuk macamana.

S: Bukan macam sapu losyen?

J: Bukan.

[90] According to SP2, the deceased conversed in English. To me, when SP2 said "Dia kata dia attack by woman from behind and another one close matanya", is a *verbatim* reproduction of the declarant's dying words even though the word "matanya" was translated by SP2 in Bahasa Malaysia. SP2 recollection of what was said to her by the deceased was certainly not an attempt to spice up the story nor it was summarised by SP2 after I have critically examined the credibility of SP2. She was very certain of this fact. I venture to say that even though SP2 did not record in written form the exact word used by the deceased in English, to me the omission was not a fatal defect.

[91] Having given this matter careful consideration, I am convinced that the dying declaration is admissible.

Failure By SP9 To Investigate

[92] I shall now consider the credibility of SP9's evidence, who came under heavy attack by the defence.

[93] In essence, counsel for the second accused contended that the shoddy investigation conducted by the investigating officer (SP9) had prejudiced the second accused. Failure to investigate the contents of exh. D211 is a serious omission and inference in the second accused's favour ought therefore to have been drawn at the close of the prosecution case.

[94] I must point out, with respect that, exh. D211 is an exculpatory statement which cannot form the basic of an acquittal as the truth contained in the statement has not been tested through cross-examination. Support for the above proposition is found in a number of cases. It has been held in *Balachandran v. PP* [2005] 1 CLJ 85 where the Federal Court had this to say at p. 91 of the report:

> It is settled law that an exculpatory statement cannot form the basis of an order in favour of an accused person at the close of the case for the prosecution as the accused, not having given evidence at that stage, could not rely on the statement without it having been tested by cross examination (see *Public Prosecutor v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233, *PP v. Adetunji Adeleye Sule* [1993] 4 CLJ 173; [1993] 2 MLJ 70, *PP v. Chan Kim Choi* [1989] 1 MLJ 404 and *R v. Storey* [1968] 52 Cr App R 334. It follows that the reliance of the learned trial judge on the exculpatory part of the accused's cautioned statement at that stage cannot be sustained in law.

[95] In *PP v. Mansor Md Rashid & Anor (supra)* Chong Siew Fai CJ Sabah & Sarawak (as he then was) said at p. 250 (CLJ); p. 576 (MLJ):

> ... A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And in considering whether there is a case to answer, the trial judge ought not to take into account such a statement as the basis for founding an order of acquittal and discharge.

[96] The next question to ask is whether exh. D211 is a substantive evidence and whether it can form the basis of an acquittal for the second accused.

[97] It was submitted by learned counsel for the second accused that by reason of the newly amended s. 113(3) of the CPC exh. D211 is a substantive evidence and strong weight ought to be given if it can support the accused's defence. Alternatively, even if exh. D211 cannot form the basis of an acquittal, it should be considered together with the other evidence. Exhibit D211 should be given the weight it deserves as required by s. 113(3) of the CPC.

[98] In response, the learned Deputy Public Prosecutor submitted that exh. D211 did not constitute substantive evidence because it had not been tested by cross-examination. It is a self-serving statement. That statement may be admitted under s. 113(3) CPC to support the second accused's defence. But there is no defence yet from the second accused until she is called to enter her defence. Therefore, the court cannot act on exh. D211 at this stage because exh. D211 has not been crystallised into evidence under the law.

[99] I have no doubt at all that the second accused had used her first reasonable opportunity to explain her story to the recording officer in her first statement recorded (exh. D211) on 18 February 2017 which was three days after she was arrested. The second statement which was a continuation of the first was given on 22 February 2017. In my view, the second accused had complied with the '*Alcontara* notice'.

[100] In *Ghasem Gharezadehsharbiani Hassan v. PP* [2014] 1 LNS 752 Azahar Mohamed JCA (as he then was) said:

> [12] The important point to make is this. The cautioned statement, which was recorded on 10/11/2010, the appellant denied any knowledge of the presence of drugs inside the bag and he gave explanation as to why he had no such knowledge. The contents of the cautioned statement represented the early disclosure of the defence of the appellant. The cautioned statement was given about three days after the appellant was arrested.
>
> Indeed, he had stated his version of events at a very early stage of the investigation against him. The contents of the cautioned statement were consistent with his oral evidence of the cautioned statement in court, hence the defence of the appellant was not something that was sprung for the first time in the defence case (see *PP v. Lin Lian Chen* [1992] 1 CLJ Rep 285; [1992] 2 MLJ 561).

[101] Applying the above principles of law, I am of the view that exh. D211 is admissible and should not be brushed aside as required by s. 113(3) of the CPC. No doubt that the cautioned statements are relevant to the accused's defence as it would support the consistency of the defence set up by the second accused. Thus, it is difficult to say that such assertion was an afterthought.

[102] The question is at which stage can exh. D211 be given weight if it can support the second accused's defence. Obviously, my answer is at the defence stage and not at the prosecution stage, since at the latter stage, the accused not having given evidence herself, her explanation could not be tested by cross-examination. **Therefore, exh. D211 can only become a substantive evidence in the course of the trial at the defence stage**. At the end of the defence case, I have a duty and obligation to fairly and justly weight the evidence including exh. D211 to reach a just result.

[103] In view of the reason above, it is my opinion that the position of law in 1992 enunciated by the Federal Court decision in *Lin Lian Chen* case where at the close of the case for the prosecution, the court can consider all the available evidence including the cautioned statement tendered by the defence and marked as defence exhibit through the investigating officer appears by necessary implication cannot stand with the decision of two Federal Court in *Mansor Mohd Rashid & Anor* (*supra*) made in 1998 and *Balachandran v. PP* [2005] 1 CLJ 85. Having considered the more recent authorities on the subject, I have come to the conclusion that *Lin Lian Chen* case (*supra)* ought no longer to be followed by this court.

[104] Reliance was placed on the case of *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645; [1998] 1 MLJ 1 where Peh Swee Chin FCJ (as he then was) said:

> If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of law. When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons prevails over the earlier decision.

[105] Having said that, with respect, the submission by the learned counsel for the second accused is devoid of merit.

[106] The submission on behalf of the first accused also relates to the issue of pranks. I have not overlooked the fact that the first accused had raised her defence of pranks through her statement given to the police *via* SP9 even though her statement was not tendered as defence exhibit. SP9 had admitted that the first accused has said in her statement that she was recruited by Mr Ri Ji U (James) to do video pranks at various location in Malaysia, including pranks at the Phnom Penh Airport in Cambodia in the month of January 2017. The first accused continued to do video pranks at KLIA and KLIA2, several days before the date of incident with one Mr Hong Song Hac, who was introduced to her at the Phnom Penh Airport by Mr Ri Ji U.

[107] On the same factual matrix of the case, it cannot be said that the first accused had failed to disclose the defence of pranks at the very first reasonable opportunity during the prosecution's case. Still such disclosure *via* her counsel's cross-examination does not in my view ring the truth what was said by her as the defence set up by the first accused has not been crystallised into evidence yet by the fact suggested (see *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1.

[108] In my view, the correct approach is to weight and consider all the suggested defence including the accused's statement given to the police and all other evidence in support of the accused's defence at the end of the defence case.

[109] I would respectfully agree with the case referred to by the learned defence counsel in *PP lwn. Muniandy Ramakrishnan & Yang Lain Dan Satu Lagi Rayuan* [2018] 1 LNS 508; [2018] MYCA 137 where the Court of Appeal held that:

> [40] Hakim bicara perlu menimbangkan keseluruhan keterangan di akhir kes pembelaan sebagaimana yang diperuntukkan di bawah seksyen 182A KAJ.
>
> [41] Kegagalan hakim bicara untuk menimbangkan keseluruhan keterangan, termasuklah apa-apa kenyataan atau percakapan yang dirakamkan dari seseorang tertuduh (percakapan beramaran atau kenyataan di bawah seksyen 112 KAJ) akan menyebabkan hakim bicara melakukan satu salah arahan undang-undang yang serius (*Prasit Punyang v. PP* [2014] 1 MLRA 387; *Md Zainuddin bin Raujan v. PP* [2013] 3 MLJ 773; *Kwok Weng Fatt v. PP & Anor Cases* [2013] 1 LNS 1304).

[110] Accordingly, I do not accept the argument of learned counsel for the first accused on this issue.

[111] Reverting back to the issue at hand on the failure by SP9 to investigate or to check the veracity of all the particulars disclosed by the defence was true or false, the defence had criticised SP9 and they did forcefully suggest that SP9's investigation was biased, one sided, not independent, incomplete etc and therefore the accused persons could not be implicated in the murder.

[112] I find no reason for SP9 to make up a story in order to nail the accused persons down to the charge. SP9 version or interpretation of the incident on that day as contained in the CCTV footage can no doubt be relevance but it certainly required me to approach that evidence with caution because there could be the possibility of mistake. However, I must here say that, only SP9's opinion of the events in the CCTV footage is inadmissible as evidence. It is perhaps worth emphasising that the CCTV footage had been tendered as evidence in court and I have been accorded the advantage to view and scrutinise the CCTV footage objectively and from all angles before I come to my own finding without being bound by SP9's own interpretation.

[113] After having carefully perused the evidence of SP9 in detailed and tested it against the probabilities of the case there were no reasons for me not to believe his evidence. The challenge mounted by the learned counsel for the accused persons against the credibility of SP9 that the investigation conducted by him was not up to the mark, is one-sided, bias, not independent and impartial and deprived the accused persons of their right to a fair trial is without merit. Therefore the truthfulness of SP9's testimony will certainly not be affected. In my view, there was nothing glaringly untruthful in what he said in his evidence. Suffice if I mention that most part of his evidence had supported his credibility having regard to all the surrounding circumstances of this case.

[114] To sum up, I find that SP9's evidence remains intact even though there were some flawed or shortcomings in his investigation. Defence counsels faulted SP9 for not carrying his investigation on the video pranks. He readily admitted his frailties when confronted by the defence. He appears to have withstood the pressured strain of searching cross-examination by experienced counsels. He did not waver under intense cross-examination by defence counsel. Apparently, I had taken additional precaution of assessing SP9's evidence and sufficiently considered his evidence in its entirety and found him to be a credible and reliable witness in light of the totality of the evidence. No doubt, there were infirmities, shortcoming or omission by SP9 to investigate certain facts or places mentioned by the learned counsel in their cross-examination and what the accused persons suggested and said in their statement given to the police, but this does not erode SP9's credibility as a witness of truth or neither it demolish the core of his evidence after having heard and seen the demeanor of the witness in person for several weeks in the witness box. In short, his evidence cannot be washed off altogether. Failure of the investigating officer to pursue various aspects raised by the defence had not prejudiced the accused persons after I have undertaken a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. After reading and considering his evidence and other evidence on record as a whole, with due caution and care, I find that SP9's evidence creditworthy. I find no reason to doubt the credibility of SP9's evidence. To me, there was nothing improbable about his evidence. Accordingly, they cannot prevail.

Issue Of Pranks

[115] I now come to the other primary issue which is crucial to the accused persons' case. It was suggested by the defence that multiple pranks were carried out in the weeks prior to Kim Chol assassination in shopping malls, hotels and at the airport where both the accused thought that they were taking part in a reality pranks show when they approached the deceased at the airport. Learned counsel further submitted that both the accused were scapegoats.

[116] This much a counsel is bound to do when cross-examining that he must put to each of the prosecution's witnesses in order to indicate both the accused's defence during the prosecution's case. I am fully aware that mere suggestions by the learned counsel do not amount to evidence by the fact suggested (see *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1. Again, I must say that I have not overlooked the fact that the first accused raised her defence of pranks through her statement given to the police *via* SP9 even though her statement was not tendered as an exhibit. On the other hand, the second accused took a different stand by putting in her statement which was marked as exh. D211.

[117] At this juncture, I must repeat that the position taken by the learned counsel for the second accused was in line with the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561 SC where Edgar Joseph SCJ had this to say:

> The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to puts its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

[118] I take this opportunity to emphasise that the second accused had admitted in exh. D211 that she thought that she was carrying out reality prank show and she didn't know that she had actually swiped the deceased's face with toxic nerve agent on the incident day. On the other hand, the first accused submitted that her presence at KLIA2 was just to do video prank and she denied that she had applied something on the face of Kim Chol.

[119] With deepest respect, I find myself not persuaded by these arguments. The word "prank" means according to Compact Oxford Dictionary "a practical joke or mischievous act". Mischievousness. It is a trick which is commonly done for fun or entertainment. The sole purpose of prank is fun. Intentionally, it has no purpose to cause any type of harm. Prank is played on others with the intention for enjoying a fun activity. So the use of the words, must, in my opinion mean a funny joke to get everyone laughing by the end, even the target, as what most of us have watched the world-famous reality television show "Just For Laughs Gags" with no sound but plenty of laughs.

[120] My comprehensive study to this subject shows that in the opening of each prank, the actors will introduce how the prank was done and how it will be shown as well. At the end of every prank, the hidden cameras are revealed and will definitely make everyone involved laugh or put a smile on the crew, face and the shows end. There is no way that the actor can play his/her prank alone because crews are needed and these crews will be at a far point that it's hidden and not visible to the person the prank will be played on.

[121] Having said that, in the instant case, it is evident that none of the features of pranks as I have mentioned above can be seen or found to exist in the CCTV footages tendered in this court.

[122] On the other hand, exh. D226 which related to the Quang Bek, which was downloaded from YouTube, ie, the **Jigsaw Puzzle Game** and crocodile game featuring the second accused is obviously not a prank. The distinction can be seen clearly from the content of the said DVDs which were played

in court where the features and the role played by the participant and the actor seem to be entirely different from the prank that I have stated earlier. Even though the game in DVD D226 is performed to cause amusement or laughter with a funny act but it does not make the target/participant look foolish as compared to what often happen in cases of real prank. I am of the view that the legal position may be stated in this way. The suggested defence of pranks raised by the first accused and the purely exculpatory or self-serving statement by the second accused is not evidence of the facts stated. And in considering whether there is a case to answer, I will not take into account the suggestion or such a statement as the basis for founding an order of acquittal and discharge especially at the close of the case for the prosecution, since at this stage, the accused not having given evidence herself, her explanation could not be tested by cross-examination. In so holding, I must impose a caveat. It must be emphasised that I have not pre-judged the issue of pranks at the close of the prosecution's case. I am moved to state that it must be a matter for consideration at the end of the trial.

[123] Furthermore, what the accused suggested or says in order to exculpate herself cannot be admissible as the truth because it is **not consistent with the evidence established by the prosecution in the course of the trial**.

[124] Moving on, I now take the other argument made by learned counsel. It was contended by the learned counsel for the second accused that she had no knowledge that the dangerous liquid applied onto her palm was VX as contained in her statement exh. D211. On the other hand, counsel for the first accused contended that the CCTV footage did not show any substance was applied onto the first accused's palms. Thus no inference can be made that the first accused had physical contact with VX. With respect, I find no merit in this argument. The contemporaneous conduct of the accused persons immediately having got rid of the deceased appears to be very strange. CCTV footage showed both women seem to be desperately and hurriedly heading or rushing for separate restrooms after the attack and holding their hands away from themselves which certainly damaged or whittled away their claim that there were no suspicious conduct on their part. The precise timing and the manner in which the act was done all goes to support the reasonable inference to be drawn that they knew the liquid that was placed on the palm of their hands were toxic substance.

[125] The question that remains unanswered is how the first accused would have got her hands on VX because the CCTV footage did not even show that she had entered the toilet but she was seen lingering outside the toilet. In my opinion, the absence of such a direct evidence does not destroy the prosecution case against her because taking together the series of events that cover both antecedent and subsequent conduct will further indicate that both of them were using the same *modus operandi* ie, attack, heading to the toilet and washed their hands. Inference can be made from this incriminating conduct.

[126] I wish to add that the defence also contended that no reasonable person knowing what is VX would have allowed VX to be applied on her palms without wearing a glove. Logically speaking, one may say that no reasonable person would put herself in a such a dangerous situation. However, that may be, judging from their conduct after the attack, it can be inferred that they knew the effect of VX on the palm of their hand and the safest way to decontaminate the poisonous VX on their hands. In view of this, it is not wrong for me to safely inferred that the accused's knowledge may have been gathered from the well-planned conspiracy between both the accused and the four still at large.

Accused Persons' Conduct

[127] I am in no doubt that both the accused were together at the time of the commission of the murder. Even if I accept the fact that the accused persons did not know each other, after having view the CCTV footage, I am prepared to say that the pattern of attack carried out by the accused persons were almost similar, timely done and simultaneously done. If one considers the events just before the attack and also immediately thereafter, it can safely be inferred that the accused persons and the four still at large had planned the killing systematically.

[128] After the attack, the accused persons went their separate ways and did not go to the nearest toilet available at level 3 but instead they quickly went to level 2 and magazine level respectively. The question is why did they choose to go to a different level. The possible answer that I can arrive at is this: if they tried to enter the toilet at the 3rd floor, the risk of them being identified or been seen by the deceased and then being arrested was very great. As such, to minimise the risk, both of them have to go to a separate toilet at a different level. In other words, they have to be far away from the deceased so that they can't be recognised by the victim. Common sense must prevail in dealing with this kind of conduct.

[129] Bearing in mind, I have allowed the request of the learned counsel to visit the scene where Kim Chol was allegedly murdered. On 24 October 2017, this court then adjourned to view the *locus in quo* of the incident, in the presence of court officials, learned prosecutors, learned defence counsel and both the accused persons. I have declared KLIA2 as open court. The site visit is important because the CCTV footage was taken from various cameras and various places. As the view at the scene crime was part of the court proceedings, this has given me, prosecutors and defence counsel a better understanding and a complete picture the location of the incident as shown in the CCTV at the airport and on how the incident took place on the day of the murder. The court visited more than 20 sites in the terminal. The visit took close to about three hours. Amongst the various location relevant to the criminal trial inspected are such as departure terminal, self check-in kiosk at level 3, Menara Medical Clinic at level 2 where Kim Chol had sought medical treatment, taxi stand, different toilets entered to by the accused

persons after the attack, Bibik Heritage where first accused met Mr Chang, the different routes taken by the accused persons after the attack etc. Upon resuming, I have read out in open court the purpose of the site visit and all the locations visited at the scene. It is beyond dispute that the site inspection was important to assist the court in visualising the scene of the alleged crimes.

[130] With that, it is high time for me to make a finding on this issue. On this point, a comparison can be made from the CCTV's footage of the prior conduct of the accused persons before and after the attack. Judging from the facial expression of both the accused immediately after the attack, one need not be in the criminal behavior field to say that both of them looked worried and tense and this indicates that they are not in a normal expression compared to when they are out from the toilet where they looked relax, behaved in a casual manner and then proceeded to the taxi stand at the ground level. Both took a taxi and left KLIA2.

[131] To me, the inescapable inference that can be drawn is this. Both their faces portray a form of suspicious behavior which was in line with their state of mind namely they had knowledge of their act. There is a clear nexus between their conduct and the offence in question. They could have been a variety of other reasons for behaving in such an unusual manner and under s. 9 of the Evidence Act 1950, the onus is on the accused to explain such kind of conduct (see *Ling Ngan Liong v. PP* [1963] 1 LNS 75; [1964] MLJ 20; *Choo Chang Teik & Anor v. PP* [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54; [1991] 3 MLJ 423. Thus in *PP v. Mansor Mohd Rashid* [1997] 1 CLJ 233; [1996] 3 MLJ 560 the Federal Court held that the intention of the accused person to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them.

[132] All these gave rise to a further inference that the pre-planning involved were meticulously arranged as planned regardless which of them did the attack that led to the death of the deceased.

[133] It is perhaps pertinent to note that the inferences that I had drawn are from proven facts and not from my own assumptions and/or personal knowledge. Useful reference may be made to the judgment of *Nasrul Anuar Abd Samad v. PP* [2005] 1 CLJ 193; [2005] 1 AMR where this court had referred to *Jones v. Dunkel* [1959] 10 CLR 298 wherein it was stated by Kitto J:

> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggest, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that case a specific event happened or a specific state of affairs existence.

[134] In *Liew Kaling & Ors v. PP* [1960] 1 LNS 60 the Malayan Court of Appeal laid down the rule that before an inference can be considered to be a valid one, it must comply with two conditions, namely:

(i) It must account for all the known facts; and

(ii) It must be the only reasonable inference which will account for all these facts.

[135] It must also be reiterated that even though there was no evidence adduced that the accused persons knew each other or knew the victim throughout the whole episode, obviously to me this is not material and it does not weaken the prosecution case at all because there are reasonable inferences to be drawn that both the accused and the four North Koreans still at large had acted in concert to murder the deceased.

Previous And Subsequent Conduct Of The first And Second Accused

[136] I shall now proceed by addressing the issue of previous and subsequent conduct of the second accused first.

[137] Learned counsel for the second accused submitted that the subsequent conduct is relevant under s. 8 of the Evidence Act 1950 and the cumulative subsequent conduct of the second accused speaks volumes of her innocence.

[138] This was indeed interesting because learned counsels have set out, at great length, ten acts of subsequent conduct that will negative the elements of both intention and knowledge. Both previous and subsequent acts of conduct are also relevant under s. 14 of the Evidence Act 1950 to show the state of mind. Section 14 provides as follow:

> Facts showing existence of state of mind or of body or bodily feeling
>
> 14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

[139] The subsequent of conducts of the second accused were as follows:

(i) The second accused did not disguise her appearance or changed her clothes after the incident;

(ii) The second accused was only in the toilet for 1 minute 9 seconds (see DVD3 - P49);

(iii) The second accused was behaving normal after she emerged from the toilet;

(iv) The second accused did not wash her LOL shirt or cut her nails;

(v) The second accused did not dispose the LOL shirt or the blue shirt she wore on 13 February 2017;

(vi) The second accused did not escape or abscond although there were opportunities for her to do so and her air ticket to Hanoi dated 23 February 2017 (exh. P86[B]);

(vii) The second accused was behaving normal when she checked into Sky Star Hotel;

(viii) The second accused went back to KLIA2 on 15 February 2017 wearing the same pair of shoes and had the same sling bag which wore on 13 February 2017;

(ix) The second accused made no difficulties when arrested; and

(x) The second accused was both truthful and fully cooperated with ASP Nasrul (SP24).

[140] Now, let me moved on to her previous conduct which consisted of the following acts:

(i) The Quang Bek pranks which the second accused participated; and

(ii) the various pranks or funny videos which the second accused did prior to 13 February 2017.

[141] To recap, learned counsel submitted that it was clear from the CCTV images from DVD3 (exh. P49) that the second accused was behaving normal when she emerged from the toilet. She was in no hurry to leave KLIA unlike the North Koreans. These were nothing unusual with regard to her behavior after the incident. She was also seen waiting for taxi and did not take the first taxi that came along (see exh. P47). The strength of this piece of evidence combined with the other various conducts buries the prosecution's case.

[142] Be that as it may, I do not propose to go into the details of all these conducts because I observe that they had been separately argued and carefully discussed in the learned counsel's oral and written submission. It is sufficient, for present purpose to say that I have perused the previous and subsequent conduct of the second accused with a toothcomb and I have this to say. From the evidence presented, prior to the attack, the second accused looked very relax and was seen walking at a slow pace. But there was one very apparent conduct that cannot be overlooked at all by this court was the conduct of the second accused immediately after the attack and before she entered the toilet and her subsequent conduct after she emerged from the toilet. There were indeed sharp contrasts of conduct that can be seen from the CCTV footage when this court makes a close observation and comparison which I do not wish to repeat.

[143] Having regard to the fact, I find that both the previous and subsequent conduct are relevant under ss. 8 and 14 of the Evidence Act 1950. But the one which was **'highly relevant' and closely connected with the crime** was the one where the second accused was seen rushing to the toilet immediately after the attack which *prima facie* can be inferred that she was having a criminal intention from the very beginning now standing the other various

cumulative or subsequent conduct of the accused as highlighted by the learned counsel. I cannot help but must state that my finding may well have been different if shortly after she came out from the toilet her conduct appears to be the same as before she entered the toilet after the attack. Definitely, such sudden change of behavior or conduct in the manner discussed earlier necessitated some explanation from her.

[144] Now, turning to the first accused, counsel representing her also attempted to persuade this court to believe that the conduct of the first accused before and after the incident were consistent with her innocence.

[145] Again, on this same note, I find that it is not necessary for me to deliberate at length on this same issue raised, safe to say that I had taken into consideration the first accused's conduct before and after the incident as submitted.

[146] Having said that and after making reference to the facts and circumstance of the case, including the contemporaneous conduct of the accused persons immediately after the attack which is prevailing in this case, I take the firm view that the challenges mounted by the learned counsel on these matters, with respect, must be dismissed.

The Representation Under Section 8 Of The Mutual Assistance In Criminal Matters Act 2002 (MACMA)

[147] The defence team for the second accused had written to the Honorable Attorney General requesting him to invoke s. 8 of MACMA 2002 to request the appropriate authority in Vietnam to take the evidence of Thuy and Nguyen Manh Quang so that their evidence can be admitted in these proceedings (exh. P215). By exh. D216, the Honorable Attorney General's office rejected the request.

[148] It was contended by the defence that the rejection is misplaced. The evidence of Thuy is obviously relevant and important as he was the one who had introduced the second accused to Mr Y to do video pranks for profit.

[149] The arguments advanced before me bring into focus s. 8 of the MACMA 2002 which reads as follows:

> Request for taking of evidence, etc.
>
> 8.(1) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any evidence would be relevant to any criminal proceedings in Malaysia, request the appropriate of a foreign State to arrange for:
>
> (a) such evidence to be taken in the foreign State;
>
> (b) the evidence to be sent to him.

[150] The question therefore arises: was the second accused interest's is in some way been 'prejudicially or adversely affected' by the failure on the part of the Attorney General not to accede to her counsel's request. I find that

the issues relating to MACMA is extra territorial in scope and being a law that transcends national boundary involving foreign State, it is open to the Attorney General to exercise his power whether to entertain such a request or otherwise. It is left entirely to his discretion in considering the counsel's application. It is, in my view, that the rejection does not in any way prevent the second accused from continuing to take other alternatives course of action according to various other relevant laws enforceable in Malaysia. Here, I have to admit that I did not have the benefit of any decided cases as authority to guide me.

[151] In any event, even if I am wrong, then, the option is still open to the second accused to call Thuy and Nguyen Manh Quang as witnesses in this trial, if I am satisfied that the accused persons be called upon to enter their defence. The law in respect of this could only be properly and satisfactorily resolved if oral evidence was later adduced and witnesses cross-examined on their evidence. Yet, these two witnesses were not willing to come to Malaysia to testify based on a feeble excuse given by them in their respective affidavit.

[152] In the circumstances, I found that nowhere the second accused was prejudiced in any way. It would be speculative and premature at this stage to say that the rejection has caused any substantial injustice to the detriment of the second accused. The second accused can still exercise other options available to her over this matter. Learned counsel should know the immediate steps that ought to have been done behind it. By taking such future exercise, they should be no risk of injustice to the second accused if a proper approach to resolve the issue of this kind is taken by them. Hence, I answered the matter at hand in the negative.

Motive

[153] The defence contended that the prosecution has failed to prove motive on the part of both the accused to commit the murder.

[154] It is also important to emphasise that there was no evidence led by the prosecution what actually prompted or excited both of them to commit the particular crime. To me, the lack of such evidence does not weakened the prosecution case as it was not possible for the prosecution to show such evidence as this is only known to the accused herself which very often not within the reach of others as no one else may know what gave birth to the evil thought in the mind of the accused persons. The motive may not be even known to the deceased. The absence of such evidence or motive to that extent is not fatal to the prosecution. Be that as it may, I have to warn myself that in the absence of motive, it is of great importance for me to scrutinise the evidence very closely to ensure that suspicion, emotions or conjecture do not take the place of proof.

[155] Investigating officer (SP9) testified that Kim Chol had met an American man five days before he was assassinated at the KLIA2. The meeting took place at an apartment in Langkawi on 9 February 2017, but the police had not been able to ascertain the man's identity and whether or not he was a spy. SP9 agreed that the police were unable to ascertain what were being discussed by the duo. SP9 also agreed that the police investigation in Langkawi was more about learning the motive of Kim Chol's murder which could not be ascertained.

[156] Section 8(1) of the Evidence Act 1950 stipulates that motive, preparation and previous or subsequent conduct is a relevant fact. It reads:

> Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

[157] The Court of Appeal in *Abdul Samid Edward v. PP* [2015] 4 CLJ 149 said:

> Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge proffered against him, notwithstanding all other evidence which points to the accused being guilty of the criminal charged.

[158] In *Ratanlal & Dhirajlal's, Law of Crimes, With List of Malaysian Cases*, (24th edn) vol. 2, p. 1391 summarises the law on motive in the following words:

> Motive is the ultimate end which a person hopes to achieve whereas intention is the immediate effect of his act. Motive is something which prompts a person to form an intention. The motive behind a crime is a relevant fact on which evidence can be given. Absence of motive is also a circumstances which is relevant for assessing the evidence. Proof of motive satisfies the judicial mind about the authorship of the crime but the absence does *not ipso facto* result in the acquittal of the accused. Motive is not a *sine qua* non to prove the case of the prosecution. Absence of proof only demands deeper forensic search and cannot undo the effect of evidence if otherwise is reliable and sufficient.

[159] In *Pathmanathan Nalliannen & Others v. PP*, Criminal Appeal No: 05-277,281-12/2015, Arifin Zakaria CJ (as he then was) in delivering the judgment of the court said:

> We wholly endorse the observations made above in that motive is an important factor but not an ingredient of an offence to be proved in cases which turn on circumstantial evidence as in the present case. That said, it does not mean that where evidence of motive is vague, non-existent or not clear, an accused is exculpated provided there is sufficient evidence pointing to his guilt.

> Having considered the matter, we agree with the defence that evidence of motive as adduced by the prosecution is far from satisfactory. At one stage, the prosecution contended that the unavailability of sufficient funds in the bank account of the first accused was the motive for the murder of Sosilawati and the three others. Later, the prosecution referred to the Penang Land transaction as the motive behind the murder. In the circumstances, we hold that the evidence as regards motive is far equivocal to be any value.

[160] Without the necessity of repeating the evidence presented by the prosecution, I could not help but conclude that there is no evidence of motive on the part of both the accused persons to commit the murder. I am fully conscious that motive is an important factor but not an ingredient of an offence to be proved in this case. That said, it does not mean that where evidence of motive is vague, non-existent or not clear, an accused persons is exculpated provided there is sufficient evidence which points to the accused. In short, I am of the view that the absence of motive on the accused part is not fatal to the prosecution's case even though it may be helpful in assisting the court to come to its decision.

[161] Be that as it may, in all fairness, based on the evidence presented, I can't rule out that this could be a political assassination. Despite that I am still unable to confirm this fact even though the evidence produced by the prosecution in the form of the CCTV footages showed the meticulous planning undertaken by the four North Koreans. It goes without saying that on this evidence alone, which amount to nothing more than suspicions is totally inadequate for the purpose of inferring political assassination in absence of any concrete evidence to support such proposition.

Post Mortem Report (Exhibit P20)

[162] I will now consider another point raised by parties where previously I had made a ruling that the brief history in exh. P20 is not admissible in law on the ground it is hearsay and prejudicial. It will be useful to produce paras. 1.1, 1.2 and 1.3 and 5.0 (sub-para 1 and 2 only):

> 1.0 HISTORY
>
> 1.1 CASE HISTORY FROM INVESTIGATING POLICE OFFICER:
>
> We were informed by the police that this 46 years old Korean man (deceased) had allegedly been applied with a dangerous fluid by 2 females on the morning of 13th Feb 2017. He was subsequently brought to the Menara Clinic in KLIA2 for treatment and later he died whilst *en route* to Hospital Putrajaya. Post mortem examination was requested by the police to determine the cause of death.
>
> 1.2 CLINICAL HISTORY FROM MEDICAL OFFICER IN MENARA CLINIC KLIA2:
>
> The deceased walked in to Menara Clinic KLIA2 at around 9.15 am on 13 February 2017 accompanied by the auxiliary policeman. He complained of severe pain of both eyes which also appeared teary. He was sweating

profusely and there was an unpleasant smell near the deceased. The vital signs showed high blood pressure with fast heart rate. Shortly afterwards, he collapsed, lost consciousness and developed convulsions with generalised twitching of the muscles. Secretions were seen drooling from the mouth. Emergency medical treatment was instituted and he was stabilised, intubated and manually ambu-bagged. At that time, his vital signs showed low blood pressure with fast heart rate. He was then given 1 ampoule of adrenalin and 1 ampoule of atropine intravenously. He was then transferred to Hospital Putrajaya *via* the KLIA2 ambulance accompanied paramedics.

5.0 CONCLUSION/SUMMARY

We were informed by the police that this 46 years old Korean man was allegedly applied on his face with a dangerous fluid substance by two females whilst at KLIA2 at around 9.00 am of 13/02/2017.

He sought treatment at the Menara Clinic KLIA2 where he was noted to be sweating profusely following which he collapsed and lost consciousness at the clinic. Emergency medical treatment was instituted and after stabilisation of his vital signs, he was sent to Hospital Putrajaya where upon his arrival at around 11.00 (13/02/2017), he was noted to have no signs of life.

[163] Here, I am persuaded by the prosecution to review my earlier ruling made. In so doing, I need to re-examine the evidence of this case and to see whether there was sufficient material or evidence for me to come to a different conclusion.

[164] The evidence on record does show that the brief history in para 1.1, para 1.2 and 5.0 (sub-para 1 and 2) was based on information given by SP9 and interview made by SP19 with SP4.

[165] I find that, the brief case history and clinical history mentioned in exh. P20 does not tantamount to hearsay evidence after SP4 and SP9 came to court to testify. The object of the evidence is not to establish the truth of the statement, but the fact was made. I also took into account that there was no prejudice suffered by the accused if the said passages remain undisturbed.

[166] For the short reason stated above, I regret to say that I have to depart from my earlier ruling made on the status of certain passages in exh. P20. Indeed, it is admissible and the said passages should not be expunged from the records.

Whether The Real Assassins Are The North Koreans

[167] Learned counsel submitted that the four North Koreans who are still at large but jointly charged are the real assassins in this case. They are Mr Chang (Hong Song Hac), Mr James (O Jong Gil), Mr Y (Ri Ji Hyon), and

Mr Hanamori (Ri Jae Nam). There was no statement recorded by the police from the four suspects because the four had left Malaysia on 13 February 2017. The defence contended that the killing was politically motivated and the key persons behind all these were the four named suspects from North Koreans. With the four suspects still at large, the full picture behind the plot to murder Kim Chol never emerge and their absence had caused prejudice to the defence because the two accused persons claimed that they were merely duped into carrying out the act because both of them believed they were in a prank TV show.

[168] On close scrutiny of the evidence presented, I find that the contention raised by the defence could not possibly hold water.

[169] I should, perhaps, say that the real assassins were the four North Koreans and both the accused. From the CCTV footages and the series of events leading up to the deceased's death reinforce the inference that there was a unity of purpose and meeting of minds between the four North Koreans and the accused persons as planned.

[170] Having regard to the evidence of this case, it is my view that there is a clear nexus between their conduct, their flight and the offence in question at the material time. Undoubtedly, such inferences cannot be simply ruled out.

[171] Notwithstanding what I have said thus far, again I took the step to warn myself that the accused persons could have been tricked by the North Koreans **but from the evidence gathered at this stage of** the trial, I am very certain that it does not point towards that direction. Thus, I see no merit in this argument.

Vague Charge

[172] I was then invited by learned counsel to make a finding on the issue that the charge framed against the accused persons was vague.

[173] To put the matter beyond any doubt, I must say that the charge framed against both the accused have fulfilled the element provided under ss. 152 and 153 of the CPC. Even though the name of the other four individual that was still at large was not mentioned in the charge, the accused persons were not left in doubt as to the existence of these four North Koreans because they have been identified by SP9 as:

(i) Mr Y - Mr Ri Ji Hyon;

(ii) Mr Hanamori - Mr Ri Jae Nam;

(iii) Mr Chong - Mr Hong Song Hac; and

(iv) Mr James - Mr O Jong Gill

[174] Not only that, their presence and involvement at the KLIA2, their conduct before and after the incident can also be seen from the relevant CCTV footages tendered in court. In short, the identities of the four were disclosed in the evidence of SP9. This was confirmed by SP9 in his testimony. The evidence also shows that the four left Malaysia a few hours after the incident. The involvement of the four North Koreans in the incident leading to the death of the deceased is indisputable.

[175] Looking at the charge framed, I am not prepared to say that the omission to disclose the identities of the four North Koreans had rendered the charge defective or vague. By virtue of s. 156 of the CPC, the omission or non-disclosure in the charge here cannot by any stretch of imagination be said to have prejudiced or misled the accused persons.

[176] On this point, it may also be pertinent to note that both the accused were represented by a team of capable and experienced lawyers and they are accorded a full opportunity to defend themselves and to cross-examine the prosecution witnesses in connection with the four persons still at large from all angles.

[177] Therefore, the accused's right to a fair trial has not been compromised as a result of such non-disclosure. In my view, I cannot see how the complaint raised before me can hold water. Similarly, the learned counsel's submission on this ground must therefore, fail.

Conclusion

[178] I have taken a step back and relooked at the evidence objectively and view the prosecution case from all angles especially the demeanours of the prosecution witnesses at the trial. I have also carefully considered the very strong and forceful arguments advanced before me by the learned defence's counsels and the learned Deputy Public Prosecutor.

[179] Suffice to say that at the close of the prosecution's case, I have to undertake a maximum evaluation of the evidence adduced and I find that the whole of the evidence presented by the prosecution at this juncture is credible for the court to safely accept, give due weight and act upon it. For the reasons I have already set out, I am satisfied that all the ingredients of the charge against the accused persons that need to be proved have been established by the prosecution. I must accordingly find that the prosecution had made out a *prima facie* case against the accused persons and I must therefore call upon them to enter their defence on their respective charges.

The Defence Case

[180] On 11 March 2019 the trial resumes with the defence stage of the proceedings where Doan Thi Huong (second accused) will take the witness stand for the first time. But before she begins her testimony, the learned Deputy Public Prosecutor stood up and inform the court that the prosecution had been instructed to withdraw the charge against Siti Aishah (first accused)

and persuaded the court to order a discharge not amounting to an acquittal "(DNAA)" pursuant to s. 254(1) of the Criminal Procedure Code "(CPC)". Unfortunately, no reason was advanced by the learned Deputy for making such a request. Learned counsel for the first accused strongly insisted that the court to acquit and discharge "(DAA)" her under s. 254(3) of the CPC. Accordingly, after hearing submission by both parties, I ordered the first accused to be DNAA of the charge.

[181] As to the position of the law, the discretionary powers of the Public Prosecutor to institute, conduct or discontinue any criminal proceedings are based on art. 145 of the Federal Constitution as well as s. 376 of the CPC. Further, s. 254 of the CPC provides as follows:

> (1) at any stage of any trial, before the delivery of judgment, the public prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) at any stage of any trial before a sessions Court or a magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) such discharge shall not amount to an acquittal unless the Court so directs.

[182] The issue that requires determination is whether the discharge should be DNAA or DAA because of the words "unless the court so directs".

[183] It was learned counsel for the first accused argument that this court should give a discharge amounting to an acquittal (DAA). Learned counsel relied on three High Court decisions in *PP v. Lau Ngiik Yin* [2008] 10 CLJ 410, *Ganesan Subramaniam v. PP* [2016] 6 CLJ 588 and *Koh Teck Chai v. PP* [1967] 1 LNS 72; [1968] 1 MLJ 166.

[184] In *Lau Ngiik Yin* case, *supra*, the prosecution applied for an order of DNAA on the ground that it was unable to locate one of its main witnesses. The defence argued that a DNAA was unfair in the circumstances, and applied for the accused to be fully acquitted and discharged. The High Court held that:

> (1) The court must order an acquittal and not a DNAA when the prosecutor has shown disinterestedness in prosecuting the case or is unable to prosecute the case for good reasons and it is unlikely that the case can be prosecuted in the short future. The liberty of His Majesty's subject cannot be placed by a continuous threat of prosecution by only an order of discharge. Such an order may be against constitutional

guarantees and support for this proposition can be garnered from *Koh Teck Chai v. PP*, *K. Abdul Rasheed, PP v. Syed Abdul Bahari Shahbuddin*, *PP v. An She Chun*, *PP v. Z* and *PP Lee Chan Sang*, *inter alia*.

[185] Learned counsel also quoted *Ganesan Subramaniam*, *supra*, where it was *inter alia* held:

> (5) There was justification for the SCJ to issue an order of discharge amounting to an acquittal in the circumstances of the case. This was so as:
>
> (i) no specific indications were given by the prosecution that they were pursuing the matter further;
>
> (ii) the prosecution, having applied for an order of DNAA, failed to give any good grounds for having the order of DNAA;
>
> (iii) there was nothing to indicate that the prosecution was able to proceed with the case for the time being or within a reasonable time;
>
> (iv) it was unlikely that the case could be prosecuted in the short future; and
>
> (v) it was not right to leave an individual with a charge hanging over for indefinite period.

[186] Finally, in *Koh Teck Chai*, *supra*, wherein Ong Hock Sim J (as His Lordship then was) in deciding on the old s. 254 concluded as follows:

> This case, as the petition shows, related to an offence alleged to have been committed on 28th July 1966 and the summons was applied for almost 5 months later on the 2 December, 1966. The case was finally called on the 13th June 1967 when the order appealed from was made. It can thus be seen that there was ample time for consideration before action was initiated and it seemed a little hard on the appellant if he is not to be freed from the prospect of further prosecution because police would most probably take departmental action against him. The appellant must have been extremely worried over a period of nearly a year, as being a detective corporal he would have been aware that a complaint had been made against him. He had also, it appears from the file, incurred expenses in connection with the attendance of the witnesses. I would have regard to the foregoing, vary the order of the learned magistrate and direct that the discharge should amount to an acquittal.

[187] It is pertinent to note that in the above-cited cases, the order for DAA was made when it was still at the prosecution stage. Undoubtedly, it is entirely distinguishable from our present case. To me, there was no valid reason why I should give a DAA after I had considered the oral and documentary evidence tendered by the prosecution at the close of the prosecution and subsequently ruled that a *prima facie* case had been made out by the prosecution against both the accused and called for the defence of the accused. Both the accused then choose to give sworn evidence after the three alternatives were explained to them.

[188] Against this backdrop, I take the view that DNAA is the most appropriate order even though I am mindful of the fact that there was failure on the part of the learned Deputy to provide reason in support of their application.

Defence Of The Second Accused

[189] On 1 April 2019, the learned DPP tendered an alternative charge to the second accused under s. 324 of the Penal Code. The alternative charge was read and explained to the accused and then she pleaded guilty to the charge. DPP submitted that the brief facts are as per the evidence.

[190] Before imposing the sentences this is what I have to say. Order as to all the exhibits tendered in court. All documentary exhibit is to be kept in this court. All the non-documentary exhibit and related to it will be handed over to the police for disposal after the lapse of the appeal period.

[191] First of all, I must say that you are a very lucky person indeed because from the original charge of murder under s. 302 of the Penal Code which carries a mandatory sentence of death penalty upon conviction, the prosecution has now offered you an alternative charge of voluntarily causes hurt by means of a VX poison under s. 324 of the Penal Code which carries only a maximum sentence of ten years' imprisonment or with fine or with whipping or with any two of such punishments. In regard to the sentence of whipping, s. 289 of the Criminal Procedure Code clearly provides that females cannot be punished with whipping. Therefore, no sentence of whipping can be imposed on you.

[192] As you are fully aware that I have ruled that the prosecution had established a *prima facie* case on the charge of murder and I have called you to enter your defence. If the trial proceeded, you may be acquitted or you may be convicted at the end of the defence case. That depends on whether you are able to create a reasonable doubt in the prosecution's case or otherwise. Be that as it may, I think should be grateful to the Honorable Attorney General and thankful to the learned Deputy Public Prosecutor for offering you the alternative charge.

[193] Now, coming back to the submission raised by both parties against sentence, I must say that I have taken into consideration the mitigation raised by the counsel for the accused which can be briefly summarised as follows:

(i) The accused had pleaded guilty immediately after the alternative charge under s. 324 of the Penal Code was offered and read to her;

(ii) The accused is a first offender and remorseful and she regretted what she did;

(iii) The accused is 30 years old and still single and she is the youngest child of five;

(iv) She has no record of previous conviction.

[194] The learned DPP on the other hand had submitted that the public interest must be given a paramount consideration and the offence committed is a serious act and deserves a deterrent sentence. The learned Deputy had also confirmed that the accused has no record of previous conviction in this country.

[195] I have no slightest doubt that a guilty plea by the accused person should be treated as a mitigating factor as it not only saves the country expenses but also saves judicial time and inconvenience of many, particularly the witnesses even though we are now at the defence stage (see Federal Court's decision in *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134 at p. 137)

[196] In my view, in applying the discretionary power on sentencing, there are several factors the court should take into account. These general principles were laid down in Federal Court's case of *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigation factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[197] Having guided by the said principles and after having struck a balance between the interest of the public and the interest of the accused, this court hereby sentence you to three years four months' imprisonment and the sentence is to run from the date of the accused's arrest (15 February 2017). It is my considered view that the length of the imprisonment sentence imposed would serve the interests of justice.

[198] Before I end this proceeding, I would like to take this opportunity to thank the learned Deputy Public Prosecutor and his team, all the learned counsel representing the present accused and the former accused for their professional way in handling and discharging their respective duties, even though I can't deny the fact that there are a few occasion where "thunderstorm" occur accompanied by strong battle of words between the prosecution and the defence. To me, there are all part and parcel of the normal thing that always happened in court especially in the case like the one before me.